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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 229.

THE STATE NATIONAL BANK OF BOSTON, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JUNE 29, 1882.

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INDEX.

	Original.	Print.
Petition filed May 7, 1869	1	1
Demurrer filed May 21, 1869	13	5
Joinder in demurrer filed June 4, 1869	14	6
Traverse filed January 7, 1870	15	6
Motion to amend petition and allowance Jan. 24, 1880	16	6
Amended petition filed Feb. 16, 1880	17	7
Traverse of amended petition Feb. 24, 1880	27	11
Motion to amend petition and allowance, June 9, 1880	28	12
Amended petition filed June 9, 1880	30	12
Traverse of amended petition July 13, 1880	41	18
Findings of fact and conclusion of law, May 8, 1882	42	18
Opinion of the court	46	23
Judgment of the court	48	25
Application for and allowance of appeal	49	25
Certificate	50	25

JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 I. *Petition. Filed May* 7, 1869.

In the Court of Claims. December Term, 1868.

THE STATE NATIONAL BANK OF BOSTON
vs.
THE UNITED STATES OF AMERICA. } No. 5944.

To the honorable "The Court of Claims" of the United States:

The "State National Bank of Boston," by Amos W. Stetson, its president, in this behalf duly authorized, respectfully represents:

First. That it is, and, prior to the first day of March, in the year eighteen hundred and sixty-seven, was, a banking association and body corporate, duly established and organized by and under the laws of the United States, having its usual place of business at its office or banking house, located at number forty State street, in the city of Boston, Commonwealth of Massachusetts.

Second. That the United States, on the first day of March, in the year eighteen hundred and sixty-seven, received to the use of the said State National Bank the sum of one hundred and twenty-
2 five thousand dollars, in currency, lawful money of the United States, and holds the same to the use of the said State National Bank; that the same was received by the United States without consideration, and in fraud of the rights of the said bank.

Third. Your petitioners represent that, on the first day of March, in the year eighteen hundred and sixty-seven, one Julius F. Hartwell was, and for some months prior thereto had been, a clerk in the office of the assistant treasurer of the United States at Boston, and in the exercise and performance of the duties of a disbursing clerk or cashier in the office of the said assistant treasurer, and as such clerk or cashier had access to, and, more or less, control of, the moneys belonging to the United States, which were at and in the office of the said assistant treasurer; that the said Hartwell, as your petitioners have been informed and believe, prior to the said first day of March, had abused the trust and confidence reposed in him as such clerk or cashier, and had, prior to said first day of March, fraudulently abstracted and embezzled moneys and cash funds belonging to the United States, which were in the possession and custody of its
3 said assistant treasurer at Boston, and to which moneys and cash funds the said Hartwell, as clerk, had access, a large sum of money, amounting, as your petitioners have been informed, to some seven or eight hundred thousand dollars; that the said Hartwell, as your petitioners have been informed and believe, was induced by one Edward Carter, who was a member of a firm, doing business at Boston as brokers, commonly called and known as "Melken, Ward and Company," to abstract the said money for the purpose of loaning the same to the said Carter, or to the said firm of which Carter was a member; that the said Hartwell fraudulently, and without authority, as your petitioners have been informed and believe, loaned the moneys and cash funds, so abstracted by him, to the said Carter,

for his use, or for the use of the said firm of Mellen, Ward and Company. Your petitioners, upon information and belief, further say that on the 28th day of February, in the year eighteen hundred and sixty-seven, in the afternoon of that day, the said Julius F. Hartwell stated to, and informed one George D. Whittle, who was at that time chief clerk in the office of the said assistant treasurer of the
4 United States, that he, the said Hartwell, had loaned moneys belonging to the United States, which was in the possession of the said assistant treasurer, to Mellen, Ward and Company, or to Carter, one of the partners of Mellen, Ward and Company, and that he, Hartwell, had got it mostly back into the office of the said assistant treasurer of the United States, and wished the said Whittle, as clerk as aforesaid, to let it go out again to the said Carter, which the said Whittle declined and refused to do; thereupon the said Hartwell informed the said Whittle that the cash, in the office of the said assistant treasurer, belonging to the United States, was deficient and short some one hundred and fifty-seven thousand dollars, which the said Hartwell had loaned to the said Carter, for his use, or for the use of Mellen, Ward and Company, which had not been returned; that upon this information and disclosure, the said Whittle said, to the said Hartwell, that the money must be brought back, into the office of the said assistant treasurer, in the morning. Your petitioners, upon information and belief, represent that the said Carter, and the said Hartwell, some days prior to the said first day of March, well knew that, on the last day of the month of February, or on
5 the first day of the month of March, in accordance with the previous usual course of business, an examination would be made by officers of the United States, authorized by law in that behalf, of the accounts of the assistant treasurer, at Boston, and of the moneys belonging to the United States, in the possession of the said assistant treasurer, and with which he was chargeable; that the said Carter and Hartwell well knew that the aforesaid embezzlement and fraudulent abstraction of the money belonging to the United States, by said Hartwell, would be discovered unless, in some mode, an amount of money equal to the sum so as aforesaid fraudulenty abstracted could be obtained and temporarily placed in the vault or money safe in the office of the said assistant treasurer, in which the moneys belonging to the United States were kept, so that the same might appear and be counted with the money and funds of the United States in the hands of the said assistant treasurer. And thereupon the said Carter undertook to obtain a sum of money equal to the amount which had been so as aforesaid abstracted by the said Hartwell, with intent to assist and enable the said Hartwell to cover up the fraud of the said Hartwell, and the said ab-
6 straction of the moneys belonging to the United States, under an agreement by the said Hartwell to return the money so to be obtained by the said Carter to him, the said Carter.

Fourth. Your petitioners further represent that on the first day of March, in the year eighteen hundred and sixty-seven, they had to their credit, on deposit, at the Manhattan Company, which carried on the business of banking at the city, county, and State of New

York, a large sum of money; that Charles H. Smith, on the said first day of March, was the cashier of the said State National Bank; that on that day the said Smith, as such cashier, fraudulently, without authority, and in violation of his duty as such cashier, and without consideration, then, or at any time since, received by the said State National Bank, or by the said Smith, issued in the name of said bank, and under his signature as cashier, a draft upon the aforesaid Manhattan Company for the sum of one hundred and twenty-five thousand dollars, payable to the order of Mellen, Ward and Company; that the said Smith fraudulently, and in violation of his duty as cashier, and without consideration aforesaid, delivered the said draft to the said Carter; that the said Smith did not
7 enter, or make any record upon the books of the said State National Bank of the issue or delivery as aforesaid of the said draft.

Fifth. That the said Carter endorsed upon the said draft, so as aforesaid frudulently issued and delivered to him by the said Smith, the name of the payees thereof, "Mellen, Ward and Company," in which firm he was a partner, and delivered it so endorsed, in blank, to the above-named Julius F. Hartwell, with intent and for the purpose, and for no other purpose, intent, or consideration, of enabling the said Hartwell to obtain the amount thereof in money, with which to conceal and cover up, for the time being, the fraudulent abstraction and embezzlement of the moneys belonging to the United States, which the said Hartwell, as hereinbefore set forth, had previously made. Your petitioners, upon information and belief, further represent that the said Hartwell went with the said draft, which had been so as aforesaid drawn, endorsed, and delivered to him, to the National Eagle Bank of Boston, and, in exchange therefor, obtained from the cashier of the said National Eagle Bank three drafts, drawn by its cashier upon its New York correspondent, the "Bank
8 of New York," two of which last named drafts were for the sum of twenty-five thousand dollars each, the other for the sum of seventy-five thousand dollars, and the said three drafts were severally made payable to the order of said Hartwell.

Sixth. Your petitioners, upon information and belief, further represent that the said Julius F. Hartwell, on the said first day of March, in the year eighteen hundred and sixty-seven, endorsed his name upon the said hereinbefore-mentioned three drafts which he received from the National Eagle Bank as aforesaid, and delivered the same, so endorsed, to the hereinbefore-mentioned George D. Whittle, clerk of the assistant treasurer of the United States at Boston, with intent, and for the purpose, and by the use of said three drafts, of covering up, to the extent one hundred and twenty-five thousand dollars, the previous defalcation and fraudulent abstraction of moneys belonging to the United States, which had been made by the said Hartwell, and for no other consideration or purpose. Your petitioners further represent, upon information and belief, that the said George D. Whittle, at the time he so received the said drafts, knew, from the statements of said Hartwell, made to him in the afternoon
9 of the twenty-eighth of February, in the year eighteen

hundred and sixty-seven, that the said Hartwell had previously and unlawfully abstracted from the office of the said assistant treasurer moneys belonging to the United States, and was in default therefor, and so received them as clerk in said office, from the said Hartwell, for the sole purpose of making good, to the extent of one hundred and twenty-five thousand dollars, the said previous fraudulent abstraction and defalcation of the said Hartwell, and upon no other or different consideration.

Seventh. Your petitioners, upon information and belief, further represent that the said George D. Whittle, on the said first day of March, upon the reception by him as aforesaid of the above-mentioned three drafts, sold the same for currency, lawful money of the United States, to the Second National Bank of Boston, making upon such sale a discount to the said Second National Bank of Boston of sixty-two dollars and fifty cents; that the said Whittle placed the proceeds of said drafts so received by him, amounting to one hundred and twenty-four thousand nine hundred and thirty-seven dollars and fifty cents, in the vault or money safe of the assistant treasurer of the United States at Boston, and with the moneys
10 belonging to the United States, in the possession of their said assistant treasurer, by whom, as such assistant treasurer, the same was retained, and ever since has been, and now is retained, by the United States.

Your petitioners, upon information and belief, further represent that on the said first day of March, and subsequent to the sale by Whittle of the three above-named drafts drawn by the National Eagle Bank, and after the proceeds thereof had been placed in the vault or money safe of the aforesaid assistant treasurer of the United States at Boston, the accounts of the said assistant treasurer, and the moneys of the United States in his possession, were examined and counted by officers of the United States appointed for that purpose, in which examination and count the proceeds of the said three drafts, obtained and received as hereinbefore stated, were included and counted.

Your petitioners, upon information and belief, further represent that the assistant treasurer of the United States at Boston, on the said first day of March, paid into the office of the said assistant treasurer the sum of sixty-two dollars and fifty cents, the amount of the discount at which the said three drafts had been sold.

11 Eighth. Your petitioners further represent that the said State National Bank paid to the National Eagle Bank the sum of one hundred and twenty-five thousand dollars, the amount of the draft, which was in manner and form, as hereinbefore stated, fraudulently and without authority drawn by the said Charles H. Smith upon the Manhattan Company, upon information and belief, they say, that the three hereinbefore-mentioned drafts drawn by the National Eagle Bank upon its New York correspondent were paid by the Bank of New York, on the presentation thereof, to the said Second National Bank of Boston.

Ninth. The said State National Bank represents that, upon and by reason of the matters and things hereinbefore set forth, the United

States are justly indebted to said bank in the sum of one hundred and twenty-five thousand dollars for money now held by the United States to the use of said bank.

Tenth. The said State National Bank further represent and aver that it has at all times borne true allegiance to the Government of the United States; that it has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government.

Eleventh. Your petitioners pray that the United States
12 may be adjudged to pay to the said State National Bank the sum of one hundred and twenty-five thousand dollars, with interest thereon from the first day of March, in the year of our Lord one thousand eight hundred and sixty-seven; and for such other relief as to this honorable court shall seem meet.

STATE NATIONAL BANK OF BOSTON,
By AMOS W. STETSON, *President.*
Address, No. 40 State street, Boston.

C. B. GOODRICH, *Attorney.*
Address, No. 30 Court street, Boston.

I, Amos W. Stetson, of Boston, county of Suffolk, Commonwealth of Massachusetts, president of the State National Bank of Boston, the claimants in the foregoing petition, on their behalf, upon oath say, that no assignment or transfer of the claim set forth in said petition, or any part thereof, or any interest therein, has been made; that the said State National Bank of Boston is justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets; and that I verily believe the facts as stated in said petition, including those stated upon information and belief, are true.

AMOS W. STETSON.

13 UNITED STATES OF AMERICA.

COMMONWEALTH OF MASSACHUSETTS, } *ss:*
City of Boston, Suffolk, }

On this fifth day of May, A. D. 1869, before the undersigned, a commissioner of the Court of Claims within and for the Commonwealth of Massachusetts, personally appeared, in said city of Boston, the above-named Amos W. Stetson, and subscribed the foregoing affidavit, and made oath that the matters therein stated are, according to his best knowledge and belief, true.

OLIVER STEVENS.

II. *Demurrer. Filed May* 21, 1869.

The defendants, by their Attorney General, come and demur to the petition of the claimant filed herein, because the same does not set forth facts sufficient to constitute a cause of action.

Wherefore they ask judgment, &c.

T. LYLE DICKEY,
Ass't. Att'y General.

14 III. *Joinder in Demurrer. Filed June* 4, 1869.

And now the claimants say that the said petition, and the matters therein contained, in manner and form as the same are above stated and set forth, are sufficient in law for them, the said claimants, to have and maintain their aforesaid petition against the said United States, and the said claimants are ready to verify and prove the same as the court here shall direct and award: Wherefore, inasmuch as the said United States have not answered the said petition, nor hitherto in any manner denied the same, the said claimants pray judgment, and their damages by reason of the non-performance of the promises and undertaking in the said petition mentioned to be adjudged to them, &c.

THE STATE NATIONAL BANK OF BOSTON,
By C. B. GOODRICH, *Solicitor.*

15 IV. *Traverse. Filed January* 7, 1870.

And the said defendants, by their Attorney General, come and make answer to the petition of the claimant herein; and not confessing the same, or any part thereof, deny each and every the allegations therein contained, and call for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the said United States are indebted to the said claimant in the sum of one hundred and twenty-five thousand dollars, the said defendants say that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the said defendants deny the said allegation.

THOMAS H. TALBOT,
Ass't Att'y General.

16 V. *Motion for Leave to Amend Petition and Allowance of Same. Filed January* 24, 1880.

The claimant moves to amend its petition by striking out from the fourth article the words "fraudulently, without authority, and in violation of his duty as such cashier and," and the words "fraudulently and in violation of his duty as such cashier and," and by striking out from the fifth article the word "fraudulently," and by striking out from the eighth article the words "fraudulently and without authority."

GEO. O. SHATTUCK,
For the Claimant.

At Chambers. Allowed.
WM. A. RICHARDSON, *Judge.*

17 VI. *Amended Petition. Filed February* 16, 1880.

To the honorable the Court of Claims of the United States:

The "State National Bank of Boston," by Amos W. Stetson, its president, in this behalf duly authorized, respectfully represents:

First. That it is, and prior to the first day of March, in the year eighteen hundred and sixty-seven, was, a banking association and body corporate, duly established and organized by and under the laws of the United States, having its usual place of business at its office or banking house, located at number forty State street, in the city of Boston, Commonwealth of Massachusetts.

Second. That the United States, on the first day of March, in the year eighteen hundred and sixty-seven, received to the use of the said State National Bank the sum of one hundred and twenty-five thousand dollars, in currency, lawful money of the United States,

18 and now holds the same to the use of the said State National Bank; that the same was received by the United States without consideration, and in fraud of the rights of the said bank.

Third. Your petitioners represent that, on the first day of March, in the year eighteen hundred and sixty-seven, one Julius F. Hartwell was, and for some months prior thereto had been, a clerk in the office of the assistant treasurer of the United States at Boston, and in the exercise and performance of the duties of a disbursing clerk, or cashier, in the office of the said assistant treasurer, and as such clerk or cashier had access to, and more or less control of, the moneys belonging to the United States, which were at and in the office of the said assistant treasurer; that the said Hartwell, as your petitioners have been informed and believe, prior to the said first day of March, had abused the trust and confidence reposed in him as such clerk or cashier, and had, prior to said first day of March, fraudulently abstracted and embezzled moneys and cash funds belonging to the United States, which were in the possession and custody of its said assistant treasurer at Boston, and to which moneys and cash funds the said Hartwell, as clerk, had access, a large sum of money, amounting, as your petitioners have been informed, to some seven or eight hundred thousand dollars; that the said Hartwell, as your petitioners have been informed and believe, was induced by one Edward Carter, who was a member of a firm doing business at Boston as brokers, commonly called

19 and known as "Mellen, Ward & Company," to abstract the said money for the purpose of loaning the same to the said Carter, or to the said firm of which Carter was a member; that the said Hartwell fraudulently, and without authority, as your petitioners have been informed and believe, loaned the moneys and cash funds, so abstracted by him, to the said Carter, for his use, or for the use of the said firm of Mellen, Ward & Company. Your petitioners, upon information and belief, further say that on the 28th day of February, in the year eighteen hundred and sixty-seven, in the afternoon of that day, the said Julius F. Hartwell stated to and informed one George D. Whittle, who was at that time chief clerk in the office of

the said assistant treasurer of the United States, that he, the said Hartwell, had loaned moneys belonging to the United States, which was in the possession of the said assistant treasurer, to Mellen, Ward & Company, or to Carter, one of the partners of Mellen, Ward & Company, and that he, Hartwell, had got it mostly back into the office of the said assistant treasurer of the United States, and wished the said Whittle, as clerk as aforesaid, to let it go out again to the said Carter, which the said Whittle declined and refused to do; thereupon the said Hartwell informed the said Whittle that the cash in the office of the said assistant treasurer belonging to the United States was deficient and short some one hundred and fifty-
20 seven thousand dollars, which the said Hartwell had loaned to the said Carter for his use, or for the use of Mellen, Ward & Company, which had not been returned; that upon this information and disclosure the said Whittle said to the said Hartwell that the money must be brought back into the office of the said assistant treasurer in the morning. Your petitioners, upon information and belief, represent that the said Carter and the said Hartwell, some days prior to the said first day of March, well knew that, on the last day of the month of February, or on the first day of the month of March, in accordance with the previous usual course of business, an examination would be made by officers of the United States, authorized by law in that behalf, of the accounts of the said assistant treasurer at Boston, and of the moneys belonging to the United States in the possession of the said assistant treasurer, and with which he was chargeable; that the said Carter and Hartwell well knew that the aforesaid embezzlement and fraudulent abstraction of the money belonging to the United States by said Hartwell would be discovered, unless in some mode an amount of money equal to the sum so as aforesaid fraudulently abstracted could be obtained and temporarily placed in the vault or money safe in the office of the said assistant treasurer in which the moneys belonging to the United States were kept, so that the same might appear and be counted with the money and funds of the United States in the hands of the said assist-
21 ant treasurer. And thereupon the said Carter undertook to obtain a sum of money equal to the amount which had been so as aforesaid abstracted by the said Hartwell, with intent to assist and enable the said Hartwell to cover up the fraud of the said Hartwell and the said abstraction of the moneys belonging to the United States, under an agreement by the said Hartwell to return the money so to be obtained by the said Carter to him the said Carter.

Fourth. Your petitioners further represent that on the first day of March, in the year eighteen hundred and sixty-seven, they had to their credit, on deposit, at the Manhattan Company, which carried on the business of banking at the city, county, and State of New York, a large sum of money; that Charles H. Smith, on the said first day of March, was the cashier of the said State National Bank; that on that day the said Smith, as such cashier, without consideration, then, or at any time since, received by the said State National Bank, or by the said Smith, issued, in the name of said bank, and under his signature as cashier, a draft upon the aforesaid Manhattan

Company, for the sum of one hundred and twenty-five thousand dollars, payable to the order of Mellen, Ward & Company; that the said Smith, without consideration as aforesaid, delivered the said draft to the said Carter; that the said Smith did not enter or make any record upon the books of the said State National Bank of the issue or delivery as aforesaid of the said draft.

22 Fifth. That the said Carter endorsed upon the said draft, so as aforesaid issued and delivered to him by the said Smith, the name of the payees thereof, "Mellen, Ward & Company," in which firm he was a partner, and delivered it so endorsed, in blank, to the above-named Julius F. Hartwell, with intent, and for the purpose, and for no other purpose, intent, or consideration, of enabling the said Hartwell to obtain the amount thereof in money, with which to conceal and cover up, for the time being, the fraudulent abstraction and embezzlement of the moneys belonging to the United States, which the said Hartwell, as hereinbefore set forth, had previously made. Your petitioners, upon information and belief, further represent that the said Hartwell went with the said draft, which had been so as aforesaid drawn endorsed, and delivered to him, to the National Eagle Bank of Boston, and in exchange therefor obtained from the cashier of the said National Eagle Bank three drafts drawn by its cashier upon its New York correspondent, the "Bank of New York," two of which last-named drafts were for the sum of twenty-five thousand dollars each, the other for the sum of seventy-five thousand dollars, and the said three drafts were severally made payable to the order of said Hartwell.

Sixth. Your petitioners, upon information and belief, further represent that the said Julius F. Hartwell, on the said first day

23 of March, in the year eighteen hundred and sixty-seven, endorsed his name upon the said hereinbefore-mentioned three drafts, which he received from the National Eagle Bank as aforesaid, and delivered the same, so endorsed, to the hereinbefore-mentioned George D. Whittle, clerk of the assistant treasurer of the United States at Boston, with intent and for the purpose and by the use of said three drafts of covering up, to the extent of one hundred and twenty-five thousand dollars, the previous defalcation and fraudulent abstraction of the moneys belonging to the United States, which had been made by the said Hartwell, and for no other consideration or purpose. Your petitioners further represent, upon information and belief, that the said George D. Whittle, at the time he so received the said drafts, knew, from the statements of said Hartwell, made to him in the afternoon of the twenty-eighth of February, in the year eighteen hundred and sixty-seven, that the said Hartwell had previously and unlawfully abstracted from the office of the said assistant treasurer moneys belonging to the United States, and was in default therefor, and so received them as clerk, in said office, from the said Hartwell, for the sole purpose of making good, to the extent of one hundred and twenty-five thousand dollars, the said previous fraudulent abstraction and defalcation of the said Hartwell, and upon no other or different consideration.

Seventh. Your petitioners, upon information and belief,
24 further represent that the said George D. Whittle, on the said first day of March, upon the reception by him as aforesaid of the above-mentioned three drafts, sold the same for currency, lawful money of the United States, to the said Second National Bank of Boston, making upon such sale a discount to the said Second National Bank of Boston of sixty-two dollars and fifty cents; that the said Whittle placed the proceeds of said drafts, so received by him, amounting to one hundred and twenty-four thousand nine hundred and thirty-seven dollars and fifty cents, in the vault or money safe of the assistant treasurer of the United States at Boston, and with the moneys belonging to the United States, in the possession of their said assistant treasurer, by whom, as such assistant treasurer, the same was retained, and ever since has been, and now is retained, by the United States. Your petitioners, upon information and belief, further represent that on the said first day of March, and subsequent to the sale by Whittle of the three above-named drafts, drawn by the National Eagle Bank, and after the proceeds thereof had been placed in the vault or money safe of the aforesaid assistant treasurer of the United States at Boston, the accounts of the said assistant treasurer and the moneys of the United States in his possession were examined and counted by officers of the United States, appointed for that purpose, in which examination and count the proceeds of the said three drafts, obtained and
25 received as hereinbefore stated, were included and counted. Your petitioners, upon information and belief, further represent that the assistant treasurer of the United States at Boston, on the said first day of March, paid into the office of the said assistant treasurer the sum of sixty-two dollars and fifty cents, the amount of the discount at which the said three drafts had been sold.

Eighth. Your petitioners further represent that the said State National Bank paid to the National Eagle Bank the sum of one hundred and twenty-five thousand dollars, the amount of the draft, which was, in manner and form, as hereinbefore stated, drawn by the said Charles H. Smith upon the Manhattan Company; upon information and belief they say that the three hereinbefore mentioned drafts drawn by the National Eagle Bank upon its New York correspondent were paid by the Bank of New York, on the presentation thereof, to the said Second National Bank of Boston.

Ninth. The said State National Bank represents that upon and by reason of the matters and things hereinbefore set forth the United States are justly indebted to said bank in the sum of one hundred and twenty-five thousand dollars, for money now held by the United States to the use of said bank.

Tenth. The said State National Bank further represents
26 and avers that it has at all times borne true allegiance to the Government of the United States; that it has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government.

Eleventh. Your petitioners pray that the United States may be adjudged to pay to the said State National Bank the sum of one

hundred and twenty-five thousand dollars, with interest thereon, from the first day of March, in the year of our Lord one thousand eight hundred and sixty-seven, and for such other relief as to this honorable court shall seem meet.

STATE NATIONAL BANK OF BOSTON,
By AMOS W. STETSON, *President.*

Address, No. 40 State Street, Boston.

I, Amos W. Stetson, of Boston, county of Suffolk, Commonwealth of Massachusetts, president of the State National Bank of Boston, the claimants in the foregoing petition, on their behalf, upon oath say that no assignment or transfer of the claim set forth in said petition, or any part thereof, or any interest therein, has been made; that the said State National Bank of Boston is justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets; and that I verily believe the facts as stated in said petition, including those stated upon information and belief, are true.

AMOS W. STETSON,

UNITED STATES OF AMERICA.

COMMONWEALTH OF MASSACHUSETTS, } *ss:*
City of Boston, Suffolk, }

On this 13th day of February, A. D. 1880, before the undersigned, a commissioner of the Court of Claims within and for the Commonwealth of Massachusetts, personally appeared, in said city of Boston, the above-named Amos W. Stetson, and subscribed the foregoing affidavit, and made oath that the matters therein stated are, according to his best knowledge and belief, true.

In witness whereof, I have hereunto set my hand and official seal, at Boston, this 13th day of February, A. D. 1880.

[SEAL.] SAMUEL JENNISON,
Comm'r of the Court of Claims, in Boston.

27 VII. *Traverse of Amended Petition. Filed February* 24, 1880.

And now comes the Attorney General, on behalf of the United States, and answering the amended petition of the claimant herein denies each and every allegation therein contained, and asks judgment that the said amended petition be dismissed.

And as to so much of the said amended petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

THOMAS SIMONS,
Ass't Attorney General.

28 VIII. *Motion for Leave to Amend Petition and Allowance of Same. Filed June* 9, 1880.

The petition moves to amend its amended petition as follows:

1. By adding at the end of the fourth section thereof the following:

"Your petitioners further represent that the said draft was obtained from the said Smith on the understanding that he was immediately to receive as the consideration for the same the check of Mellen, Ward and Company, secured by one hundred thousand dollars gold certificates, or Adams Express Company receipts for that amount, which, as said Smith understood, were to be sent directly to the bank. Said Hartwell knew the nature of the transaction between Carter and Smith. But said Carter in fact had no means, and said Carter and said Hartwell knew that he had no means of giving the said security except from the funds which said
29 Carter expected, and which said Hartwell and Whittle knew when the said draft came to their hands; that he expected and understood at the time he delivered said draft would be returned from the Treasury within an hour, in accordance with the promise of Hartwell communicated by Hartwell to said Whittle. Said security was never given, as said Whittle refused to let any funds go out of the Treasury, and the fraud hereinbefore set forth became public, and Mellen, Ward and Company failed, all within half an hour of the issuing of the draft by said Smith."

2. By inserting in the fifth section thereof, between the words "Hartwell" and "went with the said draft" the following: "after presenting the said draft to said Whittle at his suggestion."

3. By adding at the end of the sixth section the following: "Your petitioners further represent that said Whittle and said Hartwell then had reasonable ground to believe, and knew that the said one hundred and twenty-five thousand dollars had been obtained from your petitioners, and received by Hartwell and Whittle without consideration and in fraud of the rights of your petitioners."

30 A printed and sworn copy of the petition with the proposed amendments enclosed in brackets is filed herewith, said amendments being respectively on the fifth and sixth, on the seventh and on the eighth printed pages of said printed copy.

GEORGE C. SHATTUCK,
Attorney for Petitioner.

At Chambers. Allowed.
WM. A. RICHARDSON, *Judge.*

IX. *Amended Petition. Filed June* 9, 1880.

To the honorable the Court of Claims of the United States.

The "State National Bank of Boston," by Amos W. Stetson, its president, in this behalf duly authorized, respectfully represents:

First. That it is, and prior to the first day of March, in the year eighteen hundred and sixty-seven, was, a banking association and

body corporate, duly established and organized by and under the laws of the United States, having its usual place of business at its office or banking house, located at number forty State street, in the city of Boston, Commonwealth of Massachusetts.

Second. That the United States, on the first day of March, in the year eighteen hundred and sixty-seven, received to the use of the said State National Bank, the sum of one hundred and twenty-five thousand dollars in currency, lawful money of the United
31 States, and now holds the same to the use of the said State National Bank; that the same was received by the United States without consideration, and in fraud of the rights of the said bank.

Third. Your petitioners represent that, on the first day of March, in the year eighteen hundred and sixty-seven, one Julius F. Hartwell was, and for some months prior thereto had been, a clerk in the office of the assistant treasurer of the United States at Boston, and in the exercise and performance of the duties of a disbursing clerk or cashier in the office of the said assistant treasurer, and as such clerk or cashier, had access to, and, more or less, control of, the moneys belonging to the United States, which were at and in the office of the said assistant treasurer; that the said Hartwell, as your petitioners have been informed and believe, prior to the said first day of March, had abused the trust and confidence reposed in him as such clerk or cashier, and had prior to said first day of March fraudulently abstracted and embezzled moneys and cash funds belonging to the United States, which were in the possession and custody of its said assistant treasurer, at Boston, and to which moneys and cash funds the said Hartwell, as clerk, had access, a large amount of money, amounting, as your petitioners have been informed, to some seven or eight hundred thousand dollars; that the said Hartwell, as your petitioners have been informed and believe, was induced by one Edward Carter, who was a member of a firm doing business at Boston as brokers, commonly called and known as "Mellen,
32 Ward & Company," to abstract the said money for the purpose of loaning the same to the said Carter, or to the said firm of which Carter was a member; that the said Hartwell fraudulently and without authority, as your petitioners have been informed and believe, loaned the moneys and cash funds so abstracted by him to the said Carter, for his use or for the use of the said firm of Mellen, Ward & Company. Your petitioners, upon information and belief, further say that on the 28th day of February, in the year eighteen hundred and sixty-seven, in the afternoon of that day, the said Julius F. Hartwell stated to and informed one George D. Whittle, who was at that time chief clerk in the office of the said assistant treasurer of the United States, that he, the said Hartwell, had loaned moneys belonging to the United States, which was in the possession of the said assistant treasurer, to Mellen, Ward & Company, or to Carter, one of the partners of Mellen, Ward & Company, and that he, Hartwell, had got it mostly back into the office of the said assistant treasurer of the United States, and wished the said Whittle, as clerk as aforesaid, to let it go out again to the said Carter, which the

said Whittle declined and refused to do; thereupon the said Hartwell informed the said Whittle that the cash in the office of the said assistant treasurer, belonging to the United States, was deficient and short some one hundred and fifty-seven thousand dollars, which the said
33 Hartwell had loaned to the said Carter, for his use, or for the use of Mellen, Ward & Company, which had not been returned; that upon this information and disclosure, the said Whittle said, to the said Hartwell, that the money must be brought back into the office of the said assistant treasurer in the morning. Your petitioners, upon information and belief, represent that the said Carter and the said Hartwell, some days prior to the said first day of March, well knew that on the last day of the month of February or on the first day of the month of March, in accordance with the previous usual course of business, an examination would be made by officers of the United States, authorized by law in that behalf, of the accounts of the said assistant treasurer at Boston, and of the moneys belonging to the United States in the possession of the said assistant treasurer, and with which he was chargeable; that the said Carter and Hartwell well knew that the aforesaid embezzlement and fraudulent abstraction of the money belonging to the United States would be discovered, unless in some mode an amount of money equal to the sum so as aforesaid fraudulently abstracted should be obtained and temporarily placed in the vault or money safe in the office of the said assistant treasurer in which the moneys belonging to the United States were kept, so that the same might appear and be counted with the money and funds of the United States in the hands of the
34 said assistant treasurer. And thereupon the said Carter undertook to obtain a sum of money equal to the amount which had been so as aforesaid abstracted by the said Hartwell, with intent to assist and enable the said Hartwell to cover up the fraud of the said Hartwell and the said abstraction of the moneys belonging to the United States, under an agreement by the said Hartwell to return the money so to be obtained by the said Carter to him, the said Carter.

Fourth. Your petitioners further represent that on the first day of March, in the year eighteen hundred and sixty-seven, they had to their credit, on deposit, at the Manhattan Company, which carried on the business of banking at the city, county, and State of New York, a large sum of money; that Charles H. Smith, on the said first day of March, was the cashier of the said State National Bank; that on that day the said Smith, as such cashier, without consideration then, or at any time since, received by the said State National Bank, or by the said Smith, issued, in the name of said bank, and under his signature as cashier, a draft upon the aforesaid Manhattan Company for the sum of one hundred and twenty-five thousand dollars, payable to the order of Mellen, Ward & Company; that the said Smith, without consideration as aforesaid, delivered the said draft to the said Carter; that the said Smith did not enter or make any record upon the books of the said State National Bank of the issue or delivery as aforesaid of the said draft. Your petitioners further represent
35 that the said draft was obtained from the said Smith on the

understanding that he was immediately to receive as the consideration for the same the check of Mellen, Ward & Company, secured by one hundred thousand dollars, gold certificates, or Adams Express Company receipts for that amount, which, as said Smith understood, were to be sent directly to the bank. Said Hartwell knew the nature of the transaction between Carter and Smith. But said Carter in fact had no means, and said Carter and said Hartwell knew that he had no means of giving the said security except from the funds which said Carter expected, and which said Hartwell and Whittle knew, when the said draft came to their hands, that he expected and understood at the time he delivered said draft, would be returned from the Treasury within an hour, in accordance with the promise of Hartwell communicated by Hartwell to said Whittle. Said security was never given, as said Whittle refused to let any funds go out of the Treasury, and the fraud hereinbefore set forth became public and Mellen, Ward & Company failed, all within half an hour of the issuing of the draft by said Smith.

Fifth. That the said Carter endorsed upon the said draft, so as aforesaid issued and delivered to him by the said Smith, the name of the payees thereof, "Mellen, Ward & Company," in which firm he was a partner, and delivered it so endorsed, in blank, to the above-named Julius F. Hartwell, with intent and for the purpose, and for no other purpose, intent, or consideration, of enabling the
36 said Hartwell to obtain the amount thereof in money, with which to conceal and cover up for the time being the fraudulent abstraction and embezzlement of the moneys belonging to the United States, which the said Hartwell, as hereinbefore set forth, had previously made. Your petitioners, upon information and belief, further represent that the said Hartwell, after presenting the said draft to said Whittle, at his suggestion went with the said draft, which had been so as aforesaid drawn, endorsed, and delivered to him, to the National Eagle Bank of Boston, and in exchange therefor obtained from the cashier of the said National Eagle Bank three drafts, drawn by its cashier upon its New York correspondent, the "Bank of New York," two of which last-named drafts were for the sum of twenty-five thousand dollars each, the other for the sum of seventy-five thousand dollars, and the said three drafts were severally made payable to the order of said Hartwell.

Sixth. Your petitioners, upon information and belief, further represent that the said Julius F. Hartwell, on the said first day of March, in the year eighteen hundred and sixty-seven, endorsed his name upon the said hereinbefore mentioned three drafts, which he received from the National Eagle Bank as aforesaid, and delivered the same, so endorsed, to the hereinbefore-mentioned George D. Whittle, clerk of the assistant treasurer of the United States
37 at Boston, with intent and for the purpose and by the use of said three drafts of covering up, to the extent of one hundred and twenty-five thousand dollars, the previous defalcation and fraudulent abstraction of the moneys belonging to the United States, which had been made by the said Hartwell, and for no other consideration or purpose. Your petitioners further represent, upon infor-

mation and belief, that the said George D. Whittle, at the time he so received the said drafts, knew, from the statements of said Hartwell, made to him in the afternoon of the twenty-eighth of February, in the year eighteen hundred and sixty-seven, that the said Hartwell had previously and unlawfully abstracted from the office of the said assistant treasurer moneys belonging to the United States, and was in default therefor, and so received them as clerk in said office from the said Hartwell for the sole purpose of making good, to the extent of one hundred and twenty-five thousand dollars, the said previous fraudulent abstraction and defalcation of the said Hartwell, and upon no other or different consideration. Your petitioners further represent that said Whittle and said Hartwell then had reasonable ground to believe, and knew that the said one hundred and twenty-five thousand dollars had been obtained from your petitioners, and received by Hartwell and Whittle, without consideration, and in fraud of the rights of your petitioners.

Seventh. Your petitioners, upon information and belief,
38 further represent that the said George D. Whittle, on the said first day of March, upon the reception by him as aforesaid of the above-mentioned three drafts, sold the same for currency, lawful money of the United States, to the Second National Bank of Boston, making upon such sale a discount to the said Second National Bank of Boston of sixty-two dollars and fifty cents; that the said Whittle placed the proceeds of said drafts so received by him, amounting to one hundred and twenty-four thousand nine hundred and thirty-seven dollars and fifty cents, in the vault or money safe of the assistant treasurer of the United States at Boston, and with the moneys belonging to the United States in the possession of their said assistant treasurer, by whom, as such assistant treasurer, the same was retained, and ever since has been and now is retained by the United States. Your petitioners, upon information and belief, further represent that on the said first day of March, and subsequent to the sale by Whittle of the three above-named drafts drawn by the National Eagle Bank, and after the proceeds thereof had been placed in the vault or money safe of the aforesaid assistant treasurer of the United States at Boston, the accounts of the said assistant treasurer and the moneys of the United States in his possession were examined and counted by officers of the United States appointed for that purpose, in which examination and count the
39 proceeds of the said three drafts, obtained and received as hereinbefore stated, were included and counted. Your petitioners, upon information and belief, further represent that the assistant treasurer of the United States at Boston, on the said first day of March, paid into the office of the said assistant treasurer the sum of sixty-two dollars and fifty cents, the amount of the discount at which the said three drafts had been sold.

Eighth. Your petitioners further represent that the said State National Bank paid to the National Eagle Bank the sum of one hundred and twenty-five thousand dollars, the amount of the draft, which was, in manner and form as hereinbefore stated, drawn by the said Charles H. Smith upon the Manhattan Company; upon

information and belief they say that the three hereinbefore mentioned drafts, drawn by the National Eagle Bank upon its New York correspondent, were paid by the Bank of New York, on the presentation thereof, to the said Second National Bank of Boston.

Ninth. The said State National Bank represents that, upon and by reason of the matters and things hereinbefore set forth, the United States are justly indebted to said bank in the sum of one hundred and twenty-five thousand dollars for money now held by the United States to the use of said bank.

Tenth. That said State National Bank further represents and avers that it it has at all times borne true allegiance to the Government of the United States; that it has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government.

Eleventh. Your petitioners pray that the United States may be adjudged to pay to the said State National Bank the sum of one hundred and twenty-five thousand dollars, with interest thereon from the first day of March, in the year of our Lord one thousand eight hundred and sixty-seven, and for such other relief as to this honorable court shall seem meet.

STATE NATIONAL BANK OF BOSTON,
By AMOS W. STETSON, *President.*

Address, No. 40 State street, Boston.

I, Amos W. Stetson, of Boston, county of Suffolk, Commonwealth of Massachusetts, president of the State National Bank of Boston, the claimants in the foregoing petition, on their behalf, upon oath say, that no assignment or transfer of the claim set forth in said petition, or any part thereof, or any interest therein, has been made; that the said State National Bank of Boston is justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets; and that I verily believe the facts as stated in said petition, including those stated upon information and belief, are true.

AMOS W. STETSON.

UNITED STATES OF AMERICA.

COMMONWEALTH OF MASSACHUSETTS, }
City of Boston, Suffolk, } *ss:*

On this 13th day of February, A. D. 1880, before the undersigned, a commissioner of the Court of Claims within and for the Commonwealth of Massachusetts, personally appeared, in said city of Boston, the above-named Amos W. Stetson, and subscribed the foregoing affidavit, and made oath that the matters therein stated are, according to his best knowledge and belief, true.

In witness whereof, I hereto set my hand and official seal, at Bostton, this 13th day of February, A. D. 1880.

[SEAL.] SAMUEL JENNISON,
Comm'r of the Court of Claims, in Boston.

41 X. *Traverse of Amended Petition. Filed July* 13, 1880.

And now comes the Attorney General, on behalf of the United States, and answering the amended petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the said amended petition be dismissed.

And as to so much of the said amended petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney General, in pursuance of the statute in such case provided, denies the said allegations and asks judgment accordingly.

THOMAS SIMONS,
Assistant Attorney General.

42 XI. *Findings of Fact and Conclusion of Law by the Court. Filed May* 8, 1882.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be, as follows:

I.

The claimant, in February and March, 1867, was a banking association and body corporate, duly established and organized under the laws of the United States, and having its place of business in the city of Boston, Massachusetts.

II.

At the same time there was in Boston a firm of brokers, doing business under the name and style of Mellen Ward & Co., of which firm Edward Carter was the junior member.

III.

At the same time George D. Whittle was the chief clerk in the office of the assistant treasurer of the United States, in Boston, and had the general management of the office, and Julius F. Hartwell was disbursing clerk of the office, ordinarily called in the office paying teller, or cashier.

IV.

Prior to the 28th day of February, 1867, the said Mellen, Ward & Co., acting by and through the said Carter, had succeeded in inducing the said Hartwell to take out of the sub-treasury, in Boston, at various times, and place in Carter's hands, large amounts of money belonging to the United States, until, first and last, the sums which Hartwell so let Carter have aggregated a million to a million and a quarter dollars. The money which thus passed out of the sub-treasury to Carter was used by Mellen, Ward and Co. in speculating in stocks. About the middle of February, 1867, when the amount which Carter had so obtained was very large, Hartwell informed

Carter that in their use of the public money they were guilty of a crime, and showed him the United States statutes making their act a crime. This was the first information that Carter had of the criminal character of those transactions in the money of the Government.

V.

Between the middle of February and the 1st of March, 1867, several conversations in regard to the matter were held between
43 Carter and Hartwell, in which Carter laid before Hartwell his general plan, without going into details. That general plan was for Carter to go on and make Hartwell's money right for the examination of the sub-treasury, which was expected to take place on the 1st of March, upon Hartwell's solemn assurance that he would let Carter have the money out of the sub-treasury again on the 2d of March, after the examination should be over; and then Carter would with that money repay all the parties any moneys he had obtained, and then sell all the stocks and securities his firm held, and replace as much of the money in the sub-treasury as possible, so as to reduce the lost to the smallest possible amount; and Carter promised Hartwell that he would return all the money before the 1st of April, not to come out of the sub-treasury again. During the period aforesaid within which those conversations between Carter and Hartwell occurred, Hartwell knew in a general way what the resources of Mellen, Ward & Co. were, and how they were using the money he had let Carter have.

VI.

On the 28th of February Carter returned to Hartwell all the money that Hartwell had let him have, except the sum of $157,000, which Carter promised to return to him the next morning. Among the funds so returned were United States gold certificates to the amount of $580,000.

VII.

On the afternoon of the 28th of February, Hartwell made known to Whittle, the chief clerk, that he had been loaning the funds of the Government to Carter, and that money had all been returned, except about $150,000; and told Whittle that the money had been paid out to Carter, from time to time, to assist in a stock speculation; that it was paid back again to tide over the monthly examination; that he had promised Carter that the money should be repaid to him the following day; and had told Carter that he would ask Whittle's consent to allowing the money to go back to Carter again. Whittle told Hartwell that it was an impossibility to let the money go back to Carter, and that any deficiency must be paid in before ten o'clock the next morning.

VIII.

About nine o'clock a. m. of the 1st of March Hartwell called on Carter at Mellen, Ward & Co.'s office and asked him if he had that money. Carter told him he had it not then, but could give it to

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At the same time there was in Boston a firm of brokers, doing business under the name and style of Mellen Ward & Co., of which firm Edward Carter was the junior member.

III.

At the same time George D. Whittle was the chief clerk in the office of the assistant treasurer of the United States, in Boston, and had the general management of the office, and Julius F. Hartwell was disbursing clerk of the office, ordinarily called in the office paying teller, or cashier.

IV.

Prior to the 28th day of February, 1867, the said Mellen, Ward & Co., acting by and through the said Carter, had succeeded in inducing the said Hartwell to take out of the sub-treasury, in Boston, at various times, and place in Carter's hands, large amounts of money belonging to the United States, until, first and last, the sums which Hartwell so let Carter have aggregated a million to a million and a quarter dollars. The money which thus passed out of the sub-treasury to Carter was used by Mellen, Ward and Co. in speculating in stocks. About the middle of February, 1867, when the amount which Carter had so obtained was very large, Hartwell informed

Carter that in their use of the public money they were guilty of a crime, and showed him the United States statutes making their act a crime. This was the first information that Carter had of the criminal character of those transactions in the money of the Government.

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Between the middle of February and the 1st of March, 1867, several conversations in regard to the matter were held between
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On the 28th of February Carter returned to Hartwell all the money that Hartwell had let him have, except the sum of $157,000, which Carter promised to return to him the next morning. Among the funds so returned were United States gold certificates to the amount of $580,000.

VII.

On the afternoon of the 28th of February, Hartwell made known to Whittle, the chief clerk, that he had been loaning the funds of the Government to Carter, and that money had all been returned, except about $150,000; and told Whittle that the money had been paid out to Carter, from time to time, to assist in a stock speculation; that it was paid back again to tide over the monthly examination; that he had promised Carter that the money should be repaid to him the following day; and had told Carter that he would ask Whittle's consent to allowing the money to go back to Carter again. Whittle told Hartwell that it was an impossibility to let the money go back to Carter, and that any deficiency must be paid in before ten o'clock the next morning.

VIII.

About nine o'clock a. m. of the 1st of March Hartwell called on Carter at Mellen, Ward & Co.'s office and asked him if he had that money. Carter told him he had it not then, but could give it to

him before ten o'clock, and asked Hartwell if he could not take a draft on New York, stating to him that Mellen, Ward & Co. would have a very large amount of New York funds to dispose of so soon as Hartwell returned to them the gold certificates aforesaid. Hartwell then said he would take the New York funds, and the interview then ended. It does not appear that up to this time Carter had any knowledge or intimation that Hartwell had made to Whittle the disclosures set forth in the next preceding finding; nor does it appear that Carter told Hartwell anything in regard to how he intended or expected to get the draft on New York. At the close of this interview Hartwell returned from Mellen, Ward & Co.'s office to the subtreasury.

IX.

44 About half past nine o'clock a. m., on the 1st of March, Carter went to the banking house of the claimant and obtained from Charles H. Smith, the cashier of the claimant, his draft, as cashier, on the Manhattan Company, New York, in favor of Mellen, Ward & Co., for $125,000, which draft was in the words and figures following, to wit:

THE STATE NATIONAL BANK OF BOSTON,

BOSTON, *March* 1, 1867.

Pay to the order of Mellen, Ward & Co. one hundred and twenty-five thousand dollars.

C. H. SMITH, *Cashier.*

No. 215.

To the cashier of the Manhattan Company, New York.

The facts and circumstances connected with his obtaining said draft were as follows: Carter asked Smith for the bank's draft on New York for $125,000, and promised to give him immediately, in return, Mellen, Ward & Co.'s draft on New York for the same amount, with $100,000 in United States gold certificates attached, or else Adams Express Company's receipt for that amount in gold. Upon the faith of this promise Smith drew and delivered to Carter the draft aforesaid. In this interview between Carter and Smith nothing was said by Carter about there being any deficiency in the sub-treasury for which he was responsible; nor that he desired to use the draft to help make good a deficiency there; nor what his purpose was in obtaining it; nor does it appear that Smith had, at any time before or during this interview, any knowledge or intima- of the transactions between Carter and Hartwell, hereinbefore referred to.

X.

Within fifteen or twenty minutes after Carter received from Smith the draft for $125,000, Carter, at the office of Mellen, Ward Co., delivered it, together with $32,000 in currency, to Hartwell. Hartwell paid Carter nothing for the draft; it was passed to him by Carter to make good that deficiency, and Carter supposed it would not be wanted for that purpose over an hour.

XI.

Neither before nor at the time that Hartwell received from Carter the said draft for $125,000 did Hartwell know anything of the means by which Carter obtained the same from Smith.

XII.

Immediately after Hartwell received that draft and the $32,000 in currency from Carter, he took both to the sub-treasury and delivered them to Chief Clerk Whittle. Whittle objected to receiving the draft, because the rules of the Government required that the sub-treasury should receive nothing but gold, silver, legal-tender notes, or national bank notes; and, besides, he had an impression on his mind that, in some form or other, Smith, the claimant's cashier, was involved in the stock speculation which Hartwell had, the day before, told him of Mellen, Ward & Co.'s being engaged in; for Hartwell had then, after Whittle's refusal to let the money go out again, mentioned, among others, the name of Smith as one who was going to be hurt. Whittle then directed Hartwell to go out and collect the currency.

Hartwell then went out with the draft for $125,000, and tried at several banks to raise the currency on it, but could not find sufficient currency in any one bank; and he then went to the Eagle National Bank of Boston, and obtained from it, in exchange for that draft, three of its drafts on New York, one for $75,000, and two for $25,000 each, with the idea that currency might be obtained in smaller amounts at different banks; but the hour was so late then—it being about ten o'clock—that he took the three drafts directly to Whittle, at the sub-treasury; saying to him that he had obtained them from the cashier of the Eagle National Bank, in exchange for the draft for $125,000, and that was the best he could do. The Government examiners were at that time at work in the sub-treasury upon their monthly examination of the funds therein. Whittle then went out from the sub-treasury with the said three drafts of the Eagle National Bank in his possession, and sold them to the Second National Bank of Boston, and returned to the sub-treasury with the proceeds of the sale, $125,000 in currency, which he turned over, along with the $32,000 aforesaid to the examiners; which two sums made up Hartwell's deficiency, and balanced the cash account of the office. No part of the $157,000 which those two sums made up, was ever returned to Hartwell, or Carter, or Mellen, Ward & Co., or the claimant.

XIII.

Neither when the draft for $125,000 was taken by Hartwell to Whittle, nor when it was exchanged by Hartwell for the three drafts of the Eagle National Bank did Whittle have any knowledge or notice of the consideration or means by which that draft had been obtained from the cashier of the claimant; but he had an impression that Carter had procured it.

XIV.

About fifteen or twenty minutes after Smith delivered the draft for $125,000 to Carter, as stated in finding IX, Smith went to Mellen, Ward & Co.'s office to inquire the reason why Carter had not brought to him the gold certificates as he had agreed to. Carter was then absent from the office, and his partner Mellen told Smith that Carter was out about the matter at that time, and as soon as he should bring the certificates Mellen would take them to Smith. Immediately after this, Mellen, Ward & Co. sent to Smith their draft on New York for $125,000, but did not send with it any gold certificates, nor any receipt of the Adams Express Company. After waiting, perhaps fifteen minutes after that visit to Mellen, Ward & Co.'s office, Smith went there again to know why the certificates or the receipt had not been brought to him, and then, for the first time, learned that Carter was at the sub-treasury, and in trouble.

XV.

After all the forgoing transactions occurred, the claimant voluntarily paid to the Eagle National Bank the draft for $125,000
46 which Carter obtained from Smith; and the three drafts of that bank were duly paid on presentation in New York. The aforesaid draft of Mellen, Ward & Co. for $125,000 was never paid, nor was it presented to the drawee for payment.

XVI.

At the time that Smith let Carter have the draft for $125,000, as aforesaid, Smith was, as cashier, under bond to the claimant, with sureties, in the sum of $30,000, and after the claimant paid said draft the claimant made demand upon him and his sureties; and the sureties, without being sued, paid the claimant, within ninety days after the 1st of March, 1867, the full amount of their bond, and the claimant gave them a receipt therefor in terms such as the following:

State National Bank, Boston, received of —— —— the amount due from them as sureties on the bond of Charles H. Smith, late cashier of said bank, by reason of the defalcation of said Smith, resulting from an unauthorized draft made by the said Smith upon the Manhattan Co., New York, for the sum of one hundred and twenty-five thousand dollars ($125,000), which was applied to his own use.

If the said Smith shall hereafter pay to the State National Bank the said sum of one hundred and twenty-five thousand dollars, the bank will return to the sureties the amounts by them severally paid, or if he shall pay so much thereof that the bank shall be in the receipt, including the payments made by the sureties, of a surplus beyond one hundred and twenty-five thousand dollars, the bank will return and distribute such surplus to the sureties in proportion to the sums by them severally paid.

But this receipt is not to be construed or understood as an admis-

sion or recognition of any obligation on the part of the bank to take any measures to make up said defalcation, nor as the assertion of any claim by the said bank upon any funds, property, or means whereby the said defalcation, or any part thereof, can be made good, nor as any admission by the said bank that any such funds, property, or means are in existence.

Upon the foregoing facts the conclusion of law is, that the claimant's petition be dismissed on the grounds set forth in the following opinion:

XII. *Opinion of the Court.*

DRAKE, Ch. J., delivered the opinion of the court.

This case presents the third development of that most extraordinary scheme of conspiracy and fraud which was acted out in the city of Boston on the 28th of February and the 1st of March, 1867, between Edward Carter, a broker, the chief party, of the firm of Mellen, Ward & Co., and Julius F. Hartwell, the cashier in the office of the United States assistant treasurer in that city. Two other branches of that scheme have been before this court in The State National Bank of Boston's case (10 C. Cls., 519), and The First National Bank of Newton's case (16 C. Cls., 54), each of which was connected with transactions that took place on the 28th of February. The present case involves the history of a single hour on the morning of the 1st of March, and discloses facts, not as complicated, but almost, if not quite, as remarkable as those detailed in those two cases. That history is set forth in minute detail in the finding of facts, but we give here a condensed statement of it.

Prior to February 28, 1867, Carter had induced Hartwell to let him have out of the sub treasury money of the United States to the amount, first and last, of a million to a million and a quarter dollars to aid Carter in a stock speculation. In anticipation of the regular monthly examination by Government examiners of the funds in the sub-treasury, which would take place on the 1st of
47 March, Hartwell insisted on Carter's paying back to him, before or on the 28th of February, the whole amount which Hartwell had let him have, promising Carter that as soon as the examination should be over he would let him have it again. On the 28th Carter put into Hartwell's hands all of that amount, except $157,000, which he promised to give him the next morning. A few minutes after nine o'clock on that morning Carter went to the claimant's banking-house, and asked Smith (the claimant's cashier) for the bank's draft on New York for $125,000, and promised to give him immediately, in return, Mellen, Ward & Co.'s draft on New York for the same amount, with $100,000 in United States gold certificates, or else Adams Express Company's receipt for that amount in gold. Upon the faith of this promise Smith drew and delivered to Carter his draft, as cashier, on the Manhattan Company, New York, for $125,000, payable to the order of Mellen, Ward & Co. This was all that then took place between Carter and Smith; but it is found that in that interview nothing was said by Carter about

XIV.

About fifteen or twenty minutes after Smith delivered the draft for $125,000 to Carter, as stated in finding IX, Smith went to Mellen, Ward & Co.'s office to inquire the reason why Carter had not brought to him the gold certificates as he had agreed to. Carter was then absent from the office, and his partner Mellen told Smith that Carter was out about the matter at that time, and as soon as he should bring the certificates Mellen would take them to Smith. Immediately after this, Mellen, Ward & Co. sent to Smith their draft on New York for $125,000, but did not send with it any gold certificates, nor any receipt of the Adams Express Company. After waiting, perhaps fifteen minutes after that visit to Mellen, Ward & Co.'s office, Smith went there again to know why the certificates or the receipt had not been brought to him, and then, for the first time, learned that Carter was at the sub-treasury, and in trouble.

XV.

After all the forgoing transactions occurred, the claimant voluntarily paid to the Eagle National Bank the draft for $125,000
46 which Carter obtained from Smith; and the three drafts of that bank were duly paid on presentation in New York. The aforesaid draft of Mellen, Ward & Co. for $125,000 was never paid, nor was it presented to the drawee for payment.

XVI.

At the time that Smith let Carter have the draft for $125,000, as aforesaid, Smith was, as cashier, under bond to the claimant, with sureties, in the sum of $30,000, and after the claimant paid said draft the claimant made demand upon him and his sureties; and the sureties, without being sued, paid the claimant, within ninety days after the 1st of March, 1867, the full amount of their bond, and the claimant gave them a receipt therefor in terms such as the following:

State National Bank, Boston, received of —— —— the amount due from them as sureties on the bond of Charles H. Smith, late cashier of said bank, by reason of the defalcation of said Smith, resulting from an unauthorized draft made by the said Smith upon the Manhattan Co., New York, for the sum of one hundred and twenty-five thousand dollars ($125,000), which was applied to his own use.

If the said Smith shall hereafter pay to the State National Bank the said sum of one hundred and twenty-five thousand dollars, the bank will return to the sureties the amounts by them severally paid, or if he shall pay so much thereof that the bank shall be in the receipt, including the payments made by the sureties, of a surplus beyond one hundred and twenty-five thousand dollars, the bank will return and distribute such surplus to the sureties in proportion to the sums by them severally paid.

But this receipt is not to be construed or understood as an admis-

sion or recognition of any obligation on the part of the bank to take any measures to make up said defalcation, nor as the assertion of any claim by the said bank upon any funds, property, or means whereby the said defalcation, or any part thereof, can be made good, nor as any admission by the said bank that any such funds, property, or means are in existence.

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47 March, Hartwell insisted on Carter's paying back to him, before or on the 28th of February, the whole amount which Hartwell had let him have, promising Carter that as soon as the examination should be over he would let him have it again. On the 28th Carter put into Hartwell's hands all of that amount, except $157,000, which he promised to give him the next morning. A few minutes after nine o'clock on that morning Carter went to the claimant's banking-house, and asked Smith (the claimant's cashier) for the bank's draft on New York for $125,000, and promised to give him immediately, in return, Mellen, Ward & Co.'s draft on New York for the same amount, with $100,000 in United States gold certificates, or else Adams Express Company's receipt for that amount in gold. Upon the faith of this promise Smith drew and delivered to Carter his draft, as cashier, on the Manhattan Company, New York, for $125,000, payable to the order of Mellen, Ward & Co. This was all that then took place between Carter and Smith; but it is found that in that interview nothing was said by Carter about

there being any deficiency in the sub-treasury for which he was responsible, nor about his desire to use the draft to help make good a deficiency there, nor about his purpose in obtaining the draft; and there is nothing tending to show that Smith, at any time before or during that interview, had any knowledge or intimation of the preceding transactions between Carter and Hartwell. To every intent Smith issued the draft simply and solely on the faith of Carter's promise.

Carter immediately delivered the draft, together with $32,000 in currency, to Hartwell, who was wholly ignorant of the means by which the draft had been obtained from Smith, and Hartwell immediately delivered both draft and money to the chief clerk of the sub-treasury, George D. Whittle, to whom, the afternoon before, he had, without Carter's knowledge, divulged the whole matter of his transactions with Carter.

Whittle objected to receiving the draft, because the Government regulations required that the sub-treasury should receive nothing but gold, silver, legal-tender notes, or national bank notes, and directed Hartwell to go out and procure the needed amount in currency. This Hartwell endeavored to do, applying at several banks to obtain currency for the draft, but without success; and then, in the hope of getting currency for smaller drafts, he exchanged it for three drafts of the Eagle National bank, one for $75,000 and two for $25,000 each, which he took and delivered to Whittle, who went out and sold the drafts to the Second National Bank of Boston, obtaining therefor $125,000 in currency, which he placed in the hands of the examiners. It is found that Whittle had no knowledge or notice of the consideration or means by which the draft for $125,000 had been obtained from Smith.

Afterwards the claimant voluntarily paid to the Eagle National Bank the amount of that draft, and now sues the United States to recover it back from them, as so much of its money received by them which *ex æquo et bono* they ought not to keep from it.

There is, in our judgment, not the least ground upon which to base such a claim. To sustain it would be to disregard the plainest principles of law applicable to transactions between men in negotiable securities; principles which need not be arrayed here, for they enter into the most simple and elementary legal knowledge of courts and lawyers.

If it be claimed that Carter obtained the draft from Smith by fraud and without any consideration, the answer, assuming that to be so, is fourfold: 1. That that was a defense, if available at
48 all, against the payment of the draft, and the draft is not in litigation here; 2. That when the claimant found the draft in the hands of the Eagle National Bank, it was bound then to set up whatever defense it could urge against the payment of it; 3. That having voluntarily paid the draft to that bank it abandoned every defense; and, 4. That that defense would have availed nothing against a holder of the draft for value, without notice of its having been obtained by fraud and without consideration.

If it be urged that the Government has received money of the

claimants, the answer is that such is not the fact. The sum of $125,000, which went into the sub-treasury, was not received or derived from the claimant, but from the Second National Bank, and was the proceeds of a *bona fide* sale, not of the claimant's draft, but of the three drafts of the Eagle National Bank, which had in good faith been given for that draft.

The case, in its present shape, has no better foundation than it would have had if Carter had, by false and fraudulent representations, borrowed $125,000 in money from the claimant through its cashier, and paid the money to Hartwell, and Hartwell, without any knowledge of the fraud, had paid it into the sub-treasury. No court would for a moment entertain the proposition that the claimant could, under such circumstances, reclaim the money from the Government.

But we need not press conclusions any further to show how devoid of merit is this claim.

Such being our view of it, it is needless to discuss the question as to the effect of the claimant's having received $30,000 from the securities of Smith.

The judgment of the court is, that the petition be dismissed.

NOTT, J., was not present at the hearing of this case, and took no part in its decision.

XIII. *Judgment of the Court.*

At a Court of Claims held in the city of Washington on the 8th day of May, A. D. 1882, judgment was ordered to be entered as follows:

The Court, on due consideration of the premises, find for the defendants, and do order, adjudge, and decree that the petition of the claimants, The State National Bank of Boston, be dismissed.

49 XIV. *Application of Claimant for, and Allowance of, Appeal*

To the honorable the Court of Claims of the United States:

The petitioner in the above-entitled cause hereby appeals to the Supreme Court of the United States from the judgment of the Court of Claims in said cause, and makes application for such appeal, and prays that the same may be allowed.

By its attorney of record, GEO. O. SHATTUCK.

Filed May 26, 1882.

At Chambers. Allowed.
C. D. DRAKE,
Chief Justice.

50 In the Court of Claims.

THE STATE NATIONAL BANK OF BOSTON
vs.
THE UNITED STATES. } No. 5944.

I, John Randolph, assistant clerk of the Court of Claims, do

hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and the conclusion of law thereon, of the opinion of the court, of the final judgment of the court, of the application of the claimant for allowance of appeal to the Supreme Court of the United States, and of the allowance of same by Chief Justice Drake.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Washington, this thirty-first day of May, A. D. 1882.

[SEAL.] JOHN RANDOLPH,
Ass't Clerk Court of Claims.

[Endorsed on cover:] Court of Claims. No. 229. The State National Bank of Boston, appellant, *vs.* The United States. Filed 29th June, 1882.

114-401

Supreme Court of the United States.

No. 229. October Term, 1884.

THE STATE NATIONAL BANK OF BOSTON,

APPELLANT,

v.

THE UNITED STATES.

BRIEF FOR THE CLAIMANT.

Supreme Court of the United States.

No. 229. October Term, 1884.

THE STATE NATIONAL BANK OF BOSTON,

Appellant,

v.

THE UNITED STATES.

BRIEF FOR THE CLAIMANT.

STATEMENT OF THE CASE.

One Hartwell, a disbursing officer of the United States, at the Sub-Treasury in Boston, who had embezzled its funds to the amount of more than one million dollars (Record, p. 18, Finding IV), in order to conceal his crime, and escape detection, made a fraudulent arrangement with one Carter, his confederate in the crime, to obtain funds from innocent third parties to be temporarily placed in the Sub-Treasury to be counted, giving to his confederate Carter a solemn assurance that the funds should be returned immediately after the count, and as Carter supposed, within an hour of the time of deposit, to be repaid to the third parties who had provided the funds without knowledge of the use to be made of them. (Rec. p. 19, Finding V and p. 20, Finding X.) The confederate relying upon this assurance induced the cashier of the claimant, who had no knowledge of the crime, to deliver to him a draft or order on a New York bank for $125,000, by promising to deliver to him immediately as security $100,000 in gold certificates, a part of the fund, which Hartwell had assured him should come out of

the Sub-Treasury after the count, (Rec. p. 20, Findings VIII. and IX.) The draft was delivered to Hartwell, the officer of the government, and was by him exchanged for three drafts of the Eagle National Bank, and these were exchanged for bank-notes, which were used for the count. These exchanges were made, because banknotes were needed for the count, and in order to conceal the source from which the funds came, because it was known to Hartwell, that Smith, the claimant's cashier would be "hurt," if the funds were not returned from the Sub Treasury. (Record pp. 20 and 21, Findings X, XI, and XII.) Before the draft was obtained from the claimant, the officer of the United States had determined not to return the funds after they had been counted, but permitted his confederate to act upon the false assurance that they should be returned. (Record p. 19, Finding VII, p. 20, Finding X.) The claimant paid the amount of the draft to a *bona fide* holder who had paid full value for it. The funds deposited as above stated were retained in the Sub-Treasury. This suit was brought in the Court of Claims to recover the amount of the draft from the United States. The Court of Claims decided against the claimant, and it has appealed.

This is a part of the same transaction which was passed upon in the case of the United States *v.* State National Bank, 96 U. S. 30.

It differs only in form from that case, but comes within the general principle there laid down by this court, that,

> "When the money or property of an innocent person has gone into the coffers of the nation by reason of a fraud, to which its agent was a party, such money or property cannot be held by the United States against the claim of the wronged and injured party. The agent was agent for no such purpose. His doings were vitiated by underlying dishonesty, and could confer no rights upon the principal."

SPECIFICATION OF ERRORS.

Judgment should have been given for the petitioner for $125,000, with interest from March 1, 1867. The error of the Court of Claims in the dismissal of the petition will appear upon consideration of the reasons for the decision which are concisely stated in the following extract from the opinion given by Drake, C. J.

"If it be claimed that Carter obtained the draft from Smith by fraud and without any consideration, the answer, assuming that to be so, is fourfold: 1. That that was a defence, if available at all, against the payment of the draft, and the draft is not in litigation here: 2. That when the claimant found the draft in the hands of the Eagle National Bank, it was bound then to set up whatever defence it could urge against the payment of it: 3. That having voluntarily paid the draft to that bank, it abandoned every defence; and, 4. That that defence would have availed nothing against a holder of the draft for value, without notice of its having been obtained by fraud and without consideration.

"If it be urged that the Government has received money of the claimants, the answer is, that such is not the fact. The sum of $125,000, which went into the Sub Treasury, was not received or derived from the claimant, but from the Second National Bank, and was the proceeds of a *bona fide* sale, not of the claimant's draft, but of the three drafts of the Eagle National Bank, which had in good faith been given for that draft.

"The case in its present shape, has no better foundation than it would have had if Carter had, by false and fraudulent representations, borrowed $125,000 in money from the claimant through its cashier, and paid the money to Hartwell, and Hartwell, without knowledge of the fraud, had paid it into the Sub Treasury. No court would for a moment entertain the proposition that the claimant could, under such circumstances, reclaim the money from the Government."

The decision was apparently placed upon three grounds.

1. The claimant ought to have set up the defence of fraud and want of consideration to the claim on the draft, and having voluntarily paid, it has abandoned every defence.

2. The $125,000 which went into the Sub Treasury was

not received or derived from the claimant, but from the Second National Bank, and was the proceeds of a *bona fide* sale, not of the claimant's draft, but of the three drafts of the Eagle National Bank, which had in good faith been given for that draft.

3. The case has no better foundation than it would have had if Carter had by false and fraudulent representations borrowed $125,000 in money from the claimant through its cashier and paid the money to Hartwell, and Hartwell without knowledge of the fraud had paid it into the Sub Treasury.

The claimant contends that these reasons are erroneous.

Brief of Argument.

FIRST POINT.

I.

As to the first reason given by the Court of Claims that the defence ought to have been made when the draft was presented, it is found that after Hartwell received the draft from Carter he took it to one Whittle, the chief clerk in the sub-treasury; that he

"objected to receiving the draft because the rules of the government required that the sub-treasury should receive nothing but gold, silver, legal tender notes or national bank notes, and besides he had an impression on his mind that in some form or other, Smith, the claimant's cashier, was involved in the stock speculation which Hartwell had the day before told him of Mellen Ward & Co.'s being engaged in; for Hartwell had then, after Whittle's refusal to let the money go out again, mentioned among others, the name of Smith as one who was going to be hurt. Whittle then directed Hartwell to go out and collect the currency. Hartwell then went out with a draft for $125,000, and tried at several banks to raise the currency on it, but could not find sufficient currency in any one bank; and he then went to the Eagle National Bank and obtained from it in exchange

for that draft, three of its drafts on New York, one for $75,000 and two for $25,000 each, with the idea that the currency could be obtained in smaller amounts in different banks, but the hour was so late then, it being about two o'clock, that he took the three drafts directly to Whittle at the sub-treasury, saying to him that he had obtained them from the cashier of the Eagle National Bank in exchange for the draft for $125,000. Whittle then went from the sub-treasury with the said three drafts of the Eagle National Bank in his possession, and sold them to the Second National Bank of Boston, and returned to the sub-treasury with the proceeds of the sale, $125,000 in currency, which he turned over to the examiners." (Record, p. 21, Finding XII.)

The claimant paid the amount of the $125,000 draft to the Eagle National Bank, because it had purchased the draft in good faith for its full value. It could have gained nothing by attempting to make a defence against the payment of the draft, which would have been fruitless, and it cannot have waived any rights by doing voluntarily what the law must otherwise have compelled it to do. It is expressly stated in the opinion of the Court of Claims that the Eagle Bank took the draft in good faith in exchange for its own. (Record, p. 25, line 5.)

II.

The second reason stated in the opinion of the Court of Claims is that the currency deposited in the sub-treasury,

"was not received from the claimant, but from the Second National Bank, and was the proceeds of a *bona fide* sale not of the claimant's draft but of three drafts of the Eagle National bank, which had been given in good faith for that draft."

The good faith of the Second National Bank in buying and of the Eagle Bank in giving the three drafts is unquestioned. The bad faith was on the part of the agents of the United States in receiving and dealing with the claim-

ant's draft and its proceeds. The officers of the United States received the claimant's draft, and, instead of converting it into currency directly, for convenience and to cover up the transaction, because they knew that Smith, the claimant's cashier, would be hurt by it, obtained the currency indirectly by exchanging the large draft for smaller ones of the Eagle National Bank and exchanging these for currency.

This suit is in the nature of an action for money had and received upon a promise implied from the receipt of money which equitably belonged to the claimant.

The method used to convert the claimant's draft into currency was wholly immaterial.

This precise question was discussed by this court in the former case growing out of the transaction of which this was a part. In United States *v.* State Bank, 96 U. S., 35, the Court said:

"The interposition of equity is not necessary where a trust fund is perverted. The *cestui que trust* can follow it at law as far as it can be traced. *May* v. *Le Claire*, 11 Wall. 217; *Taylor et al.* v. *Plumer*, 3 M. & S. 562.

"Where a draft was remitted by a collecting agent to a sub-agent for collection, and the proceeds were applied by the sub-agent in payment of the indebtedness of the agent to himself, in ignorance of the rights of the principal, this court held that, there being no new advance made, and no new credit given by the sub-agent, the principal was entitled to recover against him. *Wilson & Co.* v. *Smith*, 3 How. 763. See also *Bank of the Metropolis* v. *The New England Bank*, 6 id. 212.

"A party who, without right and with guilty knowledge, obtains money of the United States from a disbursing officer, becomes indebted to the United States, and they may recover the amount. An action will lie whenever the defendant has received money which is the property of the plaintiff and which the defendant is obliged by natural justice and equity to refund. The form of the indebtedness or the mode in which it was incurred is immaterial. *Bayne et al., Trustees* v. *United States*, 93 U. S. 642."

III.

The third reason given by the Court of Claims was that this case has no better foundation than it would have had if Carter had, by false and fraudulent representations, borrowed $125,000 in money from the claimant through its cashier, and had paid the money to Hartwell, and Hartwell, without any knowledge of the fraud, had paid it into the sub-treasury.

This rests upon the assumption that Hartwell was not a party to the fraud. It is found (Record, p. 21, Finding XI), that, —

"neither before nor at the time that Hartwell received from Carter the said draft for $125,000, did Hartwell know anything of the means by which Carter obtained the same from Smith."

But it is also found, that

"Carter laid before Hartwell his general plan without going into details. That general plan was for Carter to go on and make Hartwell's money right for the examination of the sub-treasury . . . upon Hartwell's solemn assurance that he would let Carter have the money out of the sub-treasury again on the second of March, after the examination should be over, and then Carter would *with that money*, repay all the parties any moneys he had obtained. (Record, p. 19, Finding V.)

It was also found that Carter

"asked Hartwell if he could not take a draft on New York, stating to him that Mellen, Ward & Co. would have a large amount of New York funds to dispose of so soon *as Hartwell returned to them* the gold certificates."

(Record p. 20, Finding VIII.)

Hartwell requested Carter to obtain the money to be counted but consented to take instead a draft on New York,

having given his solemn assurance that it should be returned as soon as the count was over, and Carter supposed it would not be wanted for the count "over an hour," when at the time Hartwell knew that it was not to be returned at all, and that Smith, the claimant's cashier, was to be "hurt" by the failure to return it. (Record p. 19, Findings VII, VIII: Record p. 20, Finding X, Record p. 21, Finding XII.)

Upon these facts it must be held as in the case of *United States* v. *State Bank*, 96 U. S. 30, that Hartwell

"was privy to the entire fraud from the beginning to the end, and was a participant in its consummation," per Swayne, J.

It was found in that case, 96 U. S. 34,

"That Hartwell had no agency in carrying out the plan, except to receive the moneys and gold certificates paid to him on the 28th of February as aforesaid, and had no actual knowledge of the proceedings taken by Carter on that day to obtain the gold certificates. When Carter and Smith deposited the $120,000 of gold certificates in the sub-treasury as aforesaid, Smith did not know Hartwell, nor did Hartwell know Smith, or know that Smith was connected with any bank or money institution."

This case is stronger than that in 96 U. S. because it is found in this case Hartwell did actually know that the draft came from the claimant's cashier, and that he was to be "hurt" by the refusal to let the funds go out of the sub-treasury after the count. (Record, p. 21, Finding XII).

As against the claimant, Hartwell's fraud was much grosser than in the former case. In that case, when he secured the funds, he intended, in good faith, to return them to Carter after the count, as he had solemnly promised. But in this case, although he had promised to return the money, and knew that Carter was relying on the funds to be returned to repay all the parties any moneys he should obtain, and was acting on such reliance, he and the chief clerk, Whittle, had decided not to let the money go out of the sub-treasury.

It must be held on these facts that Hartwell was privy to the fraud from beginning to end, and that Whittle also was a party to the fraud, or at least to the consummation of it.

Hartwell and Carter were acting together for a fraudulent purpose, and the knowledge and acts of each were the knowledge and acts of the other. Whether each actually knew all the details known to the other was of no consequence.

Lincoln v. Claflin, 7 Wall. 132

Moore *v.* Tracy, 7 Wend. 229, 235; Skinner *v.* Merchants' Bank, 4 Allen, 290; Boaz *v.* Tate, 43 Ind. 60; Page *v.* Parker, 43 N. H. 363; Tappan *v.* Powers, 2 Hall, N. Y. Sup'r. Ct. 277.

A party coming late into a conspiracy is even responsible for the prior acts of the conspirators.

Stewart *v.* Johnson, 3 Harrison (N. J.), 88.

Hartwell requested Carter to obtain the funds to tide over the count, and solemnly promised to return them as soon as the count was over; he knew that Carter was relying upon the gold certificates which he expected to receive back to raise the funds, and it was clearly his intention that Carter should act upon his assurances in dealing with the parties from whom the funds came, and when the draft of the State Bank was offered to him, he had notice that the State Bank had acted upon Carter's representations that he was to have the funds. Any one for whom false representations were intended, and who has acted upon them, has a right of action.

Polhill *v.* Walter, 3 B. & Ad. 114; Langridge *v.* Levy, 2 M. & W. 519—4 M. & W. 337; Gerhard *v.* Bates, 2 El. & B. 476; Peek *v.* Gurney, L. R. 6 H. L., 377.

The same rule applies to a case of fraudulent concealment.

SECOND POINT.

The same results, even if Hartwell had had no actual or constructive knowledge of the plan, would be reached from a different line of argument. Carter obtained the draft by fraud on the bank. The agent of the United States obtained the draft by fraud on Carter. Carter obtained it on promise of giving *immediately* United States gold certificates, or an express receipt for gold. (Record, p. 20, Finding IX.) The undertaking was clear. It contemplated *no intervening lapse of time*, and *no intervening contingency*. In fifteen or twenty minutes after the delivery Smith had left his post, in business hours, to see why the undertaking had not been complied with. (Record, p. 22, Finding XIV.) His construction of the word "immediately" is the only one possible, either by way of definition or by applying the rules of common business sense to the situation of the parties. The Court of Claims, in their fourteenth Finding, have used the word in its proper sense, clearly distinguishing between an immediate act and a delay of fifteen minutes. Carter did not intend to give the gold immediately. He supposed the counting would take an hour. (Record, p. 20, Finding X.) His plan was to get the money out of the treasury again on the second of March. (Record, p. 19, Finding V.) As to an intervening contingency, he knew that the money was to pass from his control into the vaults of the Treasury, and that he was powerless to get it out, except through the continued aid of his co-conspirator. It was like the ordinary case of obtaining goods with intent not to pay. The draft was in Carter's hands by fraud. The Court of Claims in discussing the case, do so "assuming" "that Carter obtained the draft from Smith by fraud, and without consideration," and nowhere controvert that proposition. The Court adds: "The case in

its present shape has no better foundation than it would have had if Carter had, by false and fraudulent representations borrowed $125,000 in money from the claimant through its cashier," etc. Donaldson v. Farwell 93 U.S. 631

The agents of the United States obtained the draft from Carter by fraud. It is found that in February and March, 1867, Whittle and Hartwell were officers of the United States, Whittle the chief clerk, and Hartwell the cashier of the Boston office. (Record, p. 18, Findings I and III.) Hartwell took this draft on the solemn assurance that the money should go out to Carter again after the examination was over. It was taken by Hartwell to be used as a counter for a day or an hour and returned. (Record, p. 20, Finding X.) Whittle as well as Hartwell knew that Hartwell "had promised Carter that the money should be repaid to him the following day," *i. e.* March first. (Record, p. 19, Finding VII.) Even before Carter obtained the check, Hartwell had confessed to Whittle, and had been told that the money could not go out again. The draft was obtained by Hartwell by making a promise which he intended not to perform.

From no point of view is the United States in the position of a holder in good faith and for value. When their agent took the money from Carter, it had been and was distinctly stated for what it was delivered, *i. e.*, to be used as a counter and returned. (Record, p. 20, Finding X.) When Whittle retained it after the examination was over, he held it wrongfully and in violation of the agreement under which it was originally received. It was and is therefore held to the claimant's use.

THIRD POINT.

It is contended in behalf of the United States that the claim of the bank has been reduced or wholly lost by the receipt of $30,000 from the sureties on Smith's official bond as cashier. (Record, p. 22, Finding XVI.)

It has been found that Smith had no knowledge of the fraud, but issued the draft in good faith, and his act at the worst was negligent. (Record, p. 20, Finding IX.) On the ground that the issuing of the draft was unauthorized until the cashier actually received the security, his sureties paid his bond. The bank is now in pursuit of the fund from a party who holds it by the fraud of its agents. If the bank should recover the full amount of its claim and interest, it will be legally and equitably bound to refund to the sureties. If Smith had paid the full amount of the claim, he would have been subrogated to the rights of the bank.

The case is analogous to that of an insurer who pays a loss without affecting the party primarily answerable.

Yates *v.* Whyte, 4 Bing. N. C. 272.

Hall & Long *v.* The Railroad Companies, 13 Wall. 367.

GEO. O. SHATTUCK,
for the Appellant.

114-401

In the Supreme Court of the United States.

OCTOBER TERM, 1884.

THE STATE BANK, &c., v. THE UNITED STATES. } No. 229.

BRIEF FOR THE UNITED STATES.

The case made by the findings below, is fairly summed up in the brief of the learned counsel for the appellants, and, therefore, will not be repeated.

For an affirmance of the judgment, the opinion of the learned court below is relied upon.

If, for any reason, there be *error*, it is submitted that the claimant is in no case entitled to more than the difference betwixt the $125,000 paid in through Smith & Carter and the $30,000 already repaid by Smith and his sureties.

If the latter have any claim against the United States for indemnity, as having been liable only secondarily, that can be established only after hearing what is to be suggested to the contrary, which can be done only in a suit

between Smith, &c., and the United States. Such relations cannot be determined, as is submitted, in the course of this suit; and in the mean time it remains to say that the bank has already received $30,000 of the $125,000 now claimed.

S. F. PHILLIPS,
Solicitor-General.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 191.

NORMAN H. POLLOCK, APPELLANT,

vs.

THE BRIDGEPORT STEAMBOAT COMPANY, CLAIMANT OF THE STEAMBOAT "LAURA," &c.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Libel	1	1
Stipulation for libellants' costs	5	3
Claim	7	4
Stipulation for claimant's costs	8	4
Stipulation for value	10	6
Waiver of process and seizure	12	7
Answer of claimants	13	7
Exceptions to answer	18	10
Order on exceptions to answer	19	11
Warrant of remission	19	11
Supplemental answer	21	12
Exceptions to supplemental answer	23	13
Order on exceptions to supplemental answer	24	14
Judge Choate's minutes of the trial	24	14
Final decree dismissing libel	25	15
Notice of appeal	26	15
Petition of appeal	27	16
Bond on appeal	28	17

JUDD & DETWEILER, PRINTERS, WASHINGTON.

	Original.	Print.
Opinion of Judge Choate	30	17
Certificate of clerk of U. S. district court	42	25
Findings of fact by Judge Blatchford	43	25
Opinion by Judge Blatchford	44	26
Final decree	51	32
Petition of appeal to U. S. Supreme Court	53	33
Bond on appeal	58	34
Citation	62	36
Clerk's certificate	64	36

1 *Libel for Penalties Under §§ 4465 and 4469 U. S. Rev. Stat.*

United States District Court, Southern District of New York.

NORMAN H. POLLOCK
against
THE STEAMBOAT LAURA, her Boilers, Engines, &c.

To the Honorable William G. Choate, judge of the district court of the United States for the southern district of New York:

The libel of Norman H. Pollock, of the city of Brooklyn, in the State of New York, against the steamboat Laura, whereof John McNeil now is or late was master, her boilers, engines, tackle, apparel, and furniture, and against all persons intervening for their interest therein, in a cause, civil and maritime, to recover certain penalties for violation of the statute of the United States for the regulation of steam vessels (being § 4465, in Title LII of the Revised Statutes of the United States) alleges as follows:

First. That on the 31st day of May A. D. 1880, the steamboat Laura was a vessel propelled in whole or in part by steam, and was not a public vessel of the United States, or a vessel of any other country, and was not a boat propelled in whole or in part by steam for navigating canals, and was a steam vessel navigating waters of the United States, which then were and are common highways of commerce, and open to general and competitive navigation,
2 and was a steam vessel within the meaning of and subject to the provisions of Title LII of the Revised Statutes of the United States, entitled "Regulation of Steam Vessels," and had therefore been duly inspected, both as to her hull and as to her boilers, and a certificate of inspection granted to her on or about July 2d, 1879, in accordance with the provisions of said title, in which certificate of inspection (the same being the last such certificate of inspection which had been granted to her) it was stated (the said steamboat Laura being a steamer carrying passengers, and not being a ferry-boat) that the said vessel had suitable accommodations for and was allowed to carry one hundred and forty-two (142) passengers.

That on the said 31st day of May, A. D. 1880, at the city of Bridgeport, in the State of Connecticut, there was taken on board of the said steamboat Laura, by the master or owner thereof, or the agents or servants of such master or owner, four hundred and twenty-two (422) passengers, the same being a greater number of passengers than was stated in the said certificate of inspection, to the extent of two hundred and eighty (280) passengers, and the said steamboat did thereupon, having on board and carrying such passengers, proceed and navigate waters of the United States, which then were and are common highways of commerce, and open to general and competitive navigation, to wit, the waters of Long Island Sound and the bay and harbor of New York, from the said city of Bridgeport to the city of New York, in the State of New York, each of said passengers

paying or becoming liable for the sum of at least twenty cents as passage money, contrary to the provisions of section 4465 of the Revised Statutes of the United States, by reason whereof there became forfeited by the master or owner of said vessel to the libellant herein the sum of ten $\frac{20}{100}$ dollars for each of said two hundred and eighty (280) passengers so taken on board beyond the number allowed as aforesaid, to wit, the sum of twenty-eight hundred
3 and fifty-six dollars ($2,856.00), which latter sum, by force of the provisions of section 4469 of the Revised Statutes of the United States, became and is a lien on the said vessel.

Second. That on the 31st day of May, A. D. 1880, the steamboat "Laura" was a vessel propelled in whole or in part by steam, and was not a public vessel of the United States, or a vessel of any other country, and was not a boat propelled in whole or in part by steam for navigating canals, and was a steam vessel navigating waters of the United States, which then were and are common highways of commerce and open to general and competitive navigation, and was a steam vessel within the meaning of and subject to the provisions of Title LII of the Revised Statutes of the United States, entitled "Regulation of Steam Vessels," and had theretofore been duly inspected, both as to her hull and as to her boilers, and a certificate of inspection granted to her on or about July 2d, 1879, in accordance with the provisions of said title, in which certificate of inspection (the same being the last such certificate of inspection which had been granted to her), it was stated (the said steamboat "Laura" being a steamer, carrying passengers, and not being a ferry-boat) that the said vessel had suitable accommodations for and was allowed to carry one hundred and forty-two (142) passengers.

That on the said 31st day of May, A. D. 1880, at the city of New York, in the county and State of New York, there were taken on board of the said steamboat "Laura," by the master or owner thereof, or the agents of servants of such master or owner, four hundred and seventeen (417) passengers, the same being a greater number of passengers than was stated in the said certificate of inspection, to the extent of two hundred and seventy-five (275) passengers, and the said steamboat did thereupon, having on board and carrying said 417 passengers, proceed and navigate waters of the United States, which then were and are common highways of com-
4 merce, and open to general and competitive navigation, to wit, the waters of the bay and harbor of New York and of Long Island Sound, from the said city of New York to the city of Bridgeport, in the State of Connecticut, each of said passengers paying or becoming liable for the sum of at least twenty cents as passage money, contrary to the provisions of section 4465 of the Revised Statutes of the United States, by reason whereof there became forfeited by the master or owner of said vessel to the libellant herein the sum of ten $\frac{20}{100}$ dollars for each of said two hundred and seventy-five passengers so taken on board beyond the number allowed as aforesaid, to wit, the sum of two thousand eight hundred and five dollars ($2,805), which latter sum, by force of the provisions of sec-

tion 4469 of the Revised Statutes of the United States, became and is a lien on the said vessel.

That all and singular the premises are true, and that the said steamboat Laura is now within the southern district of New York.

Wherefore the libellant prays that process in due form of law, according to the course of this honorable court in cases of admiralty and maritime jurisdiction, may issue against the said steamboat and her boilers, engine, tackle, apparel, and furniture, and that all persons interested therein may be cited to appear and answer the matters hereinbefore alleged, and that this honorable court may be pleased to decree for the said several penalties aforesaid, and that the said steamboat, and her boilers, engines, tackle, apparel, and furniture may be condemned and sold to pay the said several penalties aforesaid, with costs, and that the libellant may have such
5 other relief in the premises as in law and justice he may be entitled to receive.

NORMAN H. POLLOCK.

Sworn to before me, this 22d day of September, A. D. 1880.
[SEAL.] S. G. LEATHEM,
Notary Public, New York County.

HENRY G. ATWATER,
Proctor and Advocate for Libellant.

Indorsed: "Filed Oct. 6th, 1880."

Stipulation for Libellant's Costs, entered into Pursuant to the Rules and Practices of this Court. Filed the 6th day of October, 1880.

District Court of the United States for the Southern District of New York.

Whereas a libel was filed in this court on the 6th day of October, in the year of our Lord one thousand eight hundred and eighty, by Norman H. Pollock against the steamboat "Laura," her boilers, engine, tackle, apparel, &c., for the reasons and causes in the said libel mentioned, and praying that said vessel, &c., may be condemned and sold to pay the libellant's claim and costs, and the said libellant and George G. Nason, his surety, parties hereto, hereby consenting and agreeing that, in case of default or contumacy on the part of the libellant or his surety, execution may issue against their goods, chattels, and lands for the sum of two hundred and fifty dollars:

Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned shall be, and each of them is, bound in the sum of two hundred and
6 fifty dollars, conditioned that the libellant above named shall appear and answer to the cause and interrogatories, and shall pay all such costs as shall be awarded against him by this court, or in case of appeal by the appellate court.

GEORGE G. NASON.
NORMAN H. POLLOCK.

Taken and acknowledged, this 20th day of September, 1880, before me, by and as to said George G. Nason.

[SEAL.] BURRITT S. STONE,
Notary Public, Kings County, N. Y.

(Certificate filed in N. Y. Co.)

Taken and acknowledged as to Norman H. Pollock, this 22d day of Sept., 1880, before me.

[SEAL.] S. G. LEATHEM,
Notary Public, N. Y. Co.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

George G. Nason, merchant, party to the above stipulation, being duly sworn, doth depose and say: That he resides in the southern district of New York, and that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

GEORGE G. NASON.

Sworn to, this 20th day of September, 1880, before me.

[SEAL.] BURRITT S. STONE,
Notary Public, Kings Co., N. Y. (N. Y. Co.)

7 At a stated term of the district court of the United States of America for the Southern District of New York, held at the United States court-rooms, in the city of New York, on the eighth day of October, in the year of our Lord one thousand eight hundred and eighty.

Present: The Honorable William G. Choate, district judge.

NORMAN H. POLLOCK
vs.
THE STEAMBOAT "LAURA," her Tackle, &c.

And now The Bridgeport Steamboat Company, sole owners of the steamboat "Laura," intervening for the interest of said company as owners in the said steamboat, appears before the honorable court and makes claim to the said steamboat, &c., waiving attachment by the marshal, under process of this court, at the instance of Norman H. Pollock; and the said The Bridgeport Steamboat Company aver that they are sole owners of said steamboat, and *are* in the possession of the said steamboat at the time of the filing of the libel, and that the above named are true and *bona fide* owners of the said
8 steamboat, and that no other person is the owner thereof. Wherefore, they pray to defend accordingly.

BRIDGEPORT STEAMBOAT COMPANY,
SYDNEY BISHOP, *Vice-President.*

Sworn and subscribed this —— day of October, A. D. 1880, before me by Sydney Bishop, vice-president of said company.

[SEAL.] ISAAC J. MACCABE,
Notary Public, N. Y. Co.
D. & T. McMAHON,
Proctors for Claimant, 229 Broadway.

Indorsed: "Filed Oct. 9th, 1880."

Stipulation, entered into Pursuant to the Rules and Practices of this Court. Filed the 9th day of October, 1880.

District Court of the United States, for the Southern District of New York.

Whereas a libel was filed in this court on the 6th day of October, in the year of our Lord one thousand eight hundred and eighty, by Norman H. Pollock, libellant, against the steamboat "Laura," for the reasons and causes in the said libel mentioned, and praying that the same may be condemned for penalties alleged to have been incurred, and the Bridgeport Steamboat Company, owners of said steamboat, having appeared and intervened, and the parties hereto hereby consenting, and that in case of default or contumacy on the part of the principal or sureties, execution for the sum of two hundred and fifty dollars may issue against their goods, chattels and lands;

And whereas, also, a claim has been filed in said cause by the Bridgeport Steamboat Company, as sole owners:

9 Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned shall be, and each of them is hereby, bound in the sum of two hundred and fifty dollars, conditioned that the claimants above named shall pay all costs and expenses which shall be awarded against them by the final decree of this court, or upon appeal, by the appellate court.

BRIDGEPORT STEAMBOAT CO.,
Per SYDNEY BISHOP, *Vice-President.*
J. RICHARDSON.
BENJAMIN RICHARDSON.

Taken and acknowledged, this eighth day of October, 1880, before me.

[SEAL.] ISAAC J. MACCABE,
Notary Public, New York, Co.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Joseph Richardson and Benjamin Richardson, parties to the above stipulation, being duly sworn, do depose and say, and each for himself says, that he resides in the city of New York; that he is worth the sum of fived hundred dollars, over and above all his just debts and liabilities.

J. RICHARDSON.
BENJAMIN RICHARDSON.

Sworn to, this eighth day of October, 1880, before me.

[SEAL.] ISAAC J. MACCABE,
Notary Public, New York Co.

Recorded the ninth day of October, 1880.

Approved October 9, 1880.

H. G. ATWATER,
Proctor for Libellant.

10 *Stipulation for Value, entered into Pursuant to the Rules and Practices of this Court. Filed the 9th day of October*, 1880.

District Court of the United States for the Southern District of New York.

(In Admiralty.)

Whereas a libel was filed on the 6th day of October, in the year of our Lord one thousand eight hundred and eighty, by Norman H. Pollock, libelant, against the steamboat "Laura," her tackle, &c., claiming fifty-six hundred and sixty-one dollars, penalties, for the reasons and causes in the said libel mentioned; and whereas the said steamboat is not attached, but service of process is waived, and the owners of said steamboat, to wit, The Bridgeport Steamboat Company, have filed a claim and intervened for their interest in said vessel; and the said vessel having been valued six thousand dollars, and a consent that a stipulation be entered into for that amount of six thousand dollars, as appears from said claim and consent now on file in said court; and the parties hereto, hereby consenting and agreeing that in case of default or contumacy on the part of the claimants, or their sureties, execution for the above amount may issue against their goods, chattels, and lands:

Now, therefore, the condition of the stipulation is such, that if the stipulators undersigned shall at any time, upon the interlocutory or final order or decree of the said district court, or of any appellate court to which the above-named suit may proceed, and upon notice of such order or decree, to D. & T. McMahon, Esqs., proctors for the claimants of said steamboat, abide by and pay the money awarded by the final decree rendered by the court or the appellate court, if any
11 appeal intervene, then this stipulation to be void; otherwise, to remain in full force and virtue.

BRIDGEPORT STEAMBOAT CO.,
Per SYDNEY BISHOP, *Vice-President.*
J. RICHARDSON.
BENJAMIN RICHARDSON.

Taken and acknowledged, this 8th day of October, 1880, before me.

[SEAL.] ISAAC J. MACCABE,
Notary Public, New York Co.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Joseph Richardson and Benjamin Richardson, parties to the above stipulation, being duly sworn, do depose and say, and each for himself says: That he resides in the city of New York and southern district of New York; that he is worth the sum of twelve thousand dollars over and above all his just debts and liabilities.

J. RICHARDSON,
BENJAMIN RICHARDSON.

Sworn to, this 8th day of October, 1880, before me.

[SEAL.] ISAAC J. MacCABE,
Notary Public, New York Co.

Recorded this ninth day of October, 1880.

Approved, Oct. 9th, 1880.

H. G. ATWATER,
Proctor for Libellant.

12 United States District Court, Southern District of New York.

NORMAN H. POLLOCK
ag'st
THE STEAMBOAT "LAURA," her Boilers, Engines, &c.

We consent that actual issue of the process and seizure of the steamboat "Laura," in the above-entitled cause, by the marshal of the southern district of New York, be and is waived, and that the answer, demurrer, or exception to the libel be filed on or before October 26, 1880, at 11 a. m., or such further day as may be fixed by consent of the parties or order of the court, otherwise default and judgment to be entered, and that thereafter the cause in all things proceed as if the said vessel had been arrested and regularly discharged on stipulation.

It is further consented that the value of the said vessel, for the purpose of giving a stipulation for value, be fixed at six thousand dollars.

Dated October 18, 1880.

D. & T. McMAHON,
Proctors for Claimants.
HENRY G. ATWATER,
Proctor for Libellant.

Indorsed: "Filed October 9, 1880."

13 United States District Court, Southern District of New York.

NORMAN H. POLLOCK
vs.
THE STEAMBOAT "LAURA," her Boilers, Engines, &c.

The answer of the Bridgeport Steamboat Company, the owners of the steamboat "Laura," claiming and intervening for their interest in the said vessel, respond to the libel of the libellant as follows, to wit:

Firstly. They aver that they are a corporation duly incorporated by and under the laws of the State of Connecticut. That they are the sole owners of the steamboat "Laura," her tackle, apparel, and furniture and equipments, and as such they are protesting against the jurisdiction of this court, in admiralty, to take cognizance of this case or to grant to the libellant the relief he claims, and judgment he prays for in this action; they claim and intervene for their interest in their said vessel, her tackle, apparel, furniture, and equip-

ments, and pray this court whether this court will further entertain cognizance of this cause, for the reasons following, to wit:

(*a*) The said action should have been commenced in the name of the United States, and by the regular officer of the United States for the southern district of New York, in prosecutions of a like character.

(*b*) The said action was improperly commenced against the steamboat "Laura," her tackle, &c. It should have been commenced, if at all, for the matters and penalties alleged against her master, or her owners by name *in personam*, and a prayer for a lien *in rem* in the event of a recovery in such action *in personam*.

14 (*c*) As to the first cause of action in said libel, to wit, the receiving on board of 280 excess of passengers in Bridgeport, the same was in the district of Connecticut, wherein said action alone could have been maintained, and the union of said claim with another and distinct receipt on board of passengers in excess of the certificate allowance in the city of New York was and is a misjoinder of causes of action, and fatal to the jurisdiction of this court under the matters alleged.

(*d*) The master or owner of said steamboat "Laura," and the claimants of said vessel, her tackle, &c., are entitled to a trial by jury, and the libellant cannot in this action have a condemnation *in rem* at the suit of an informer who is not, as said Pollock, the libellant, is not, an officer of the United States, nor suing in this suit for the benefit of the Government, without the said claimants having a trial by jury.

(*e*) It nowhere appears in the libellant's said libel that he was a passenger on board of the said vessel on either of the trips counted on in either the first or second causes of action of said libel, and entitled because of his alleged peril of life, or limb, because of such excess of passengers, to the penalties and forfeitures therein demanded.

The libellant in his said libel has mingled up in the same libel an aggregate demand for an aggregate number of penalties and passage moneys belonging to other and distinct parties, who might have been passengers on said vessel on said trips, and entitled severally to the forfeitures, or portions thereof, therein claimed and demanded.

(*f*) Nor does the libellant specify the names of the passengers on said trips who were in excess of the number specified by law to be carried under the certificate claimed, nor does he specify who were cabin nor who were deck passengers therein, on the two trips counted on in his said libel.

(*g*) Nor does the libellant sue as an informer, nor as an
15 officer of the United States, on behalf of or for the benefit of an informer.

(*h*) Nor does the libellant in his said libel set up and negative the fact that the said "Laura," on her trips mentioned, had the special permit to carry the said number of passengers in excess of the number in the certificate named, nor that the same was indorsed on the face of said certificate.

(*j*) Nor does the libellant aver that he alone has sued for the said penalties, and that no other person has, prior to him, sued for the claim.

(*k*) Nor is the said action one that is civil and maritime.

(*l*) Nor has this court, in this district, jurisdiction under the facts alleged in this suit, jurisdiction to seize and condemn the said steamboat "Laura."

(*m*) If section 4465 of the Revised Statutes, taken in connection with section 4469 of said Statutes, be construed as allowing the present libellant to maintain this action, the same is unconstitutional and void to that extent, as the same are in violation of the provisions of the Constitution of the United States, article 3, subdivision 3, and articles 5, 6, 7, and 8 of the amendments thereto.

(*n*) The said libel does not authorize the libellant to demand an answer on oath from the claimants of the said vessel, entitling him to recover his said penalties.

(*o*) In no event is the libellant entitled to recover for more than one penalty.

Secondly. Further protesting that they are not called on to answer further in this cause, yet, out of respect to this intelligent and elevated tribunal, they do say that they admit that John McNeil was and is the master of their said vessel.

That on the 31st day of May, A. D. 1880, the steamboat "Laura" was a vessel propelled wholly by steam. That it was not a public vessel of the United States, nor a vessel of any other country, but was owned by them, a corporation *duly incorporated by the laws of Connecticut.*

16 That it was not a vessel propelled in whole or in part by steam for navigating canals; but they admit that the "Laura" was a vessel navigating from Bridgeport to New York and returning through the waters of Long Island Sound and waters connecting therewith, which were then and are now highways of commerce and open to competitive navigation. And they admit that she was a steam vessel within the meaning of and subject to the provisions of Title 52 of the Revised Statutes of the United States, entitled Regulation of Steam Vessels, and had theretofore been duly inspected both as to her hull and as to her boilers, and a certificate of inspection granted to her on or about July 2d, 1879, in accordance with the provisions of said title. They admit, with the qualification in the third paragraph hereinafter stated, that in said certificate of inspection it was stated that she had suitable accommodations for, and was allowed to carry, 142 passengers.

They further admit that the said steamboat "Laura," having all the life-saving apparatus and preservers, and accommodations in the third paragraph hereinafter mentioned, made a trip on the 31st day of May, between Bridgeport and New York, on the waters aforesaid, and returned from New York to Bridgeport and carried passengers thereon.

But these claimants, further answering, claim and insist that by and under provisions of the Revised Statutes and laws of the United States, and also of the Codes and Statutes of New York, which, by

section 858 and other sections of the Revised Statutes of the United States, are made to govern cases of this character, they are not called upon to admit nor to deny nor to answer, in any respect, the remainder of the allegations of the said libel, because they say that to answer the same might and would tend to subject them to a penalty, and forfeiture to a party not an officer of the United States, as the plaintiff is not, and they put libellant in this action to his proof in that regard; wherefore they pray this court to adjudge
17 whether or not they are not excused at the suit of a private party from such further answer.

Thirdly. For another and distinct defense to the said libellant's two causes of action they do aver and say, that on the whole of the 31st day of May, 1880, they had on board of their said vessel "Laura" life-preservers and life-saving apparatus and other appliances and equipments, and suitable accommodations for 352 first-class or cabin passengers and "deck passengers," and they had before that time, viz., the 31st day of May, 1880, received special permission from the United States steamboat inspectors of the district of Connecticut wherein said vessel was enrolled to carry 500 passengers. That by accident, or neglect, or omission, they had omitted to have the collector of Bridgeport to endorse on their certificate granted to them on July 2d, 1879, such permission to carry such extra number, and were therefore, if guilty of any facts authorizing a penalty, only guilty of a penalty under sections 4499 and 4500 of the 52d title aforesaid, with which penalty the libellant, as such in this action, has no right to intermeddle, and is entitled in this action to no right thereunder.

Wherefore these claimants pray the judgment of this court as to whether or not they should be further vexed in this action, and as to this court to dismiss said libellant's said libel with costs.

BRIDGEPORT STEAMBOAT CO.,
SIDNEY BISHOP, *Vice-President*,
D. & T. McMAHON,
Proctors for Claimants.
DENNIS McMAHON, *Advocate.*

Sworn to before me, this 2d day of November, 1880, by Sidney Bishop, vice-president of said Bridgeport Co.

[SEAL.]

R. W. TODD,
Notary Public, N. Y. Co.

Indorsed: "Filed Nov. 3d, 1880."

18 *Exceptions to Answer.*

United States District Court, Southern District of New York.

NORMAN H. POLLOCK
ag'st
THE STEAMBOAT "LAURA," her Boilers, Engines, &c.

Norman H. Pollock, the libellant herein, hereby excepts to the

answer filed herein by the Bridgeport Steamboat Company as claimants, and as grounds of such exception state as follows:

I. That said answer is insufficient, because it does not answer, either by admitting or denying the same, the allegations of the libel as to the number of passengers that were taken on board of the steamboat "Laura" on the two trips made by her on May 31, 1880.

II. That the third paragraph of said answer is irrelevant, because the facts therein stated constitute no defense to this action, because

(*a*) It does not allege that the "Laura," on the said 31st day of May, or on the trips mentioned in the libel, was engaged in excursions, or that a special permit, in writing, for the occasion was issued to her by the steamboat inspectors.

(*b*) Because it does not allege that any of the passengers carried by the "Laura" on said May 31, 1880, were deck passengers, and does not show that they were not all first-class or cabin passengers.

(*c*) Because the facts stated in said third paragraph constitute no defense to the action, and do not go in mitigation of the damages.

HENRY G. ATWATER,
Proctor for Libellant.

Indorsed: "Filed Nov. 11, 1880."

19 At a stated term of the district court of the United States of America for the southern district of New York, held at the United States court-rooms, in the city of New York, on Tuesday, the 21st day of December, in the year of our Lord one thousand eight hundred and eighty.

Present: The Honorable William G. Choate, district judge.

NORMAN H. POLLOCK
vs.
THE STEAMBOAT "LAURA," her Boilers, Engines, &c., THE BRIDGEPORT STEAMBOAT CO., Claimants.

The exceptions to the answer of the claimants, The Bridgeport Steamboat Company, having duly come on to be heard, now, after hearing the advocates for the respective parties, and upon due deliberation thereon, it is

Ordered, That the first of said exceptions be, and the same hereby is, overruled, and the second of said exceptions, to wit, that the third paragraph of said answer is irrelevant, because the facts therein stated do not constitute a defense to this action, be, and the same hereby is, sustained.

(Signed) W. G. CHOATE.

Indorsed: "Filed Dec. 22, 1880."

Warrant of Remission.

To all to whom these presents shall come, I, John Sherman, Secretary of the Treasury of the United States, send Greeting:

Whereas a petition bearing date the eighteenth day of
20 October, 1880, has been made before me by the Bridgeport Steamboat Company, by J. B. Hubbell, superintendent, for

the remission of a forfeiture of the passage money and certain penalties, amounting to $5,661, alleged to have been incurred by the steamboat "Laura," on the thirty-first day of May, A. D. 1880, by carrying an excess of passengers over the number allowed by law, viz.: on a trip from Bridgeport to New York, 280 passengers in excess, and a trip from New York to Bridgeport, 275 passengers in excess, under the Revised Statutes of the United States, sections 4465 and 4469;

And whereas, I, the said Secretary of the Treasury, having maturely considered the said petition, and being satisfied that the said offenses were committed without wilful negligence or intention to evade the requirements of the law, and that no danger to human life was caused thereby:

Now, therefore, know ye, that I, the said Secretary of the Treasury, in consideration of the premises, and by virtue of the power and authority to me given by the 5294th section of said Statutes, do hereby decide to remit to the petitioner all the right, claim and demand of the United States, and of all others whatsoever, to said forfeiture of passage money and penalties on payment of costs, if any there be.

Given under my hand and seal of office, in the city of Washington, the seventeenth day of November, in the year of Lord one thousand eight hundred and eighty, and the one hundredth and fifth year of the Independence of the United States.

[SEAL.] JOHN SHERMAN,
Secretary of the Treasury.

Indorsed: "Filed Nov. 22d, 1880."

21 United States District Court, Southern District of New York.

In Admiralty.

NORMAN H. POLLOCK
vs.
THE STEAMBOAT "LAURA," her Tackle, &c.

Of December Term, A. D., 1880.

And now comes into this court the Bridgeport Steamboat Company, the owners and claimants of the above-named steamboat "Laura," her tackle, apparel, and furniture, and here by leave of the court further answering, in addition to the matter already contained in their previous answer, do aver that since they put in their former answer and since the last continuance of this cause, they did, pursuant to section 5294 of the Revised Statutes of the United States, apply by their petition to the Honorable the Secretary of the Treasury of the United States for a remission of the penalties sued for in this action, on divers grounds therein stated, and to which they refer. That the said Secretary entertained said application, and for the purpose of further advising himself upon the subject matter of said petition, did order the district attorney of the United States in and for the southern district of New York to examine into and report upon the facts and grounds set forth in said petition, and

thereupon the said district attorney did hear the respective counsel in this action, on notice to them, and heard and investigated said petition, and the grounds thereof, and did make his report to the said the Secretary of the Treasury, with his opinion, and thereupon the said Secretary of the said Treasury, after fully weighing all the facts of the case and the grounds of said petition, did, in pur-
22 suance of said section, remit to the said the Bridgeport Steamboat Company, the owners and claimants of the said steamboat "Laura," all and singular the penalties sued for in this action, and did discharge them of and therefrom, and also the said steamboat of and from any lien thereof.

And these claimants do further answer that there was a condition therein contained, to wit, that these claimants should pay the costs of the libellant therein—which warrant of remission has been duly signed and sealed by the said Secretary, and has been and is now duly filed in the clerk's office of this court, and these defendants and claimants have duly tendered to the said libellant his costs in this action, and they now make said tender good by offering to pay into this court the amount thereof when and so soon as the said libellant shall procure the same to be taxed.

And these claimants and respondents, further answering by like leave of the court, do further aver that at the time of the issuing by the said Secretary of his aforesaid warrant of remission, the claims of the said libellant in and to the penalties in this action had not been determined by any court of competent jurisdiction.

Wherefore the said claimants and defendants pray that the said suit be dismissed and determined pursuant to the direction of the said warrant of remission, and without waiving any of their defenses heretofore put in, in this action, they may have the judgment of this court accordingly.

And as in duty bound they will ever pray, &c.

BRIDGEPORT STEAMBOAT COMPANY,
JOHN B. HUBBELL, *Supt.*

D. & T. McMAHON,
Proctors for Claimants.

Sworn to before me, this 23d day of December, A. D. 1880, by John B. Hubbell, superintendent of the Bridgeport Steamboat Company.

[SEAL.] R. W. TODD,
Notary Public, New York Co.

Indorsed: "Filed Dec. 23d, 1880."

23 *Exceptions to Supplemental Answer.*

United States District Court, Southern District of New York.

NORMAN H. POLLOCK
ag'st
THE STEAMBOAT "LAURA," her Engines, &c.

The libellant hereby excepts to the supplemental answer of the claimants filed herein on December 23d, 1880, as follows:

First Exception. The said supplemental answer states no facts constituting a defense to this action, because—

(*a*) Section 5294 of the U. S. Rev. Stat. is unconstitutional and void, because it attempts to confer on the Secretary of the Treasury a portion of the power to grant pardons for offenses against the United States, which power, and the whole of it, is by Article II, § 2, of the Constitution of the United States, exclusively vested in the President of the United States; and because

(*b*) Section 5294 of the U. S. Rev. Stat. does not extend to conferring on the Secretary of the Treasury the power to remit the penalty given by § 4465, after suit has been brought to recover the same.

Second Exception. So much of said supplemental answer as begins with the words "for the purpose of further advising himself upon the subject-matter of said petition," and continues through to the end of the words "after fully weighing all the facts of the case and the grounds of said petition," is irrelevant and immaterial, and should be stricken out.

Dated December 29th, 1880.

HENRY G. ATWATER,
Proctor and Advocate for Libellant.

Indorsed: "Filed Dec. 29th, 1880."

24 At a stated term of the district court of the United States of America for the southern district of New York, held at the United States court-rooms, in the city of New York, on Tuesday, the 4th day of January, in the year of our Lord one thousand eight hundred and eighty-one.

Present: The Honorable William G. Choate, district judge.

NORMAN H. POLLOCK *vs.* THE STEAMBOAT "LAURA."

The exceptions to the supplemental answer herein having duly come on to be heard, now, after hearing the advocates for the respective parties,

Ordered, That said exceptions, and each of them, be, and the same is hereby, overruled.

(Signed) WM. G. CHOATE.

Indorsed: "Filed January 5th, 1881."

Judge Choate's Minutes of the Trial.

POLLOCK *vs.* STEAMBOAT "LAURA."

Book No. 25, page 84.
1881, Jan'y 4.
H. G. Atwater for libellant.
D. McMahon for claimant.

(The warrant of remission and seal of Treasury Department
25 produced. Admitted by libellant that it was duly issued.)

Libellant offers to prove allegations of libel not admitted by the answer. Objected. Excluded.

(Admitted that costs have been taxed and paid into court by claimant.)

Decree dismissing the libel, &c.

At a stated term of the district court of the United States of America for the southern district of New York, held at the United States court-rooms, in the city of New York, on Tuesday, the 4th day of January, in the year of our Lord one thousand eight hundred and eighty-one.

Present: The Hon. Wm. G. Choate, district judge.

NORMAN H. POLLOCK
vs.
THE STEAMBOAT "LAURA," her Tackle.

This case having been heard on the pleadings, exceptions, proofs, and the certificate of the clerk, that the libellant's taxed costs have been paid into court, and the cause having been argued by the advocates for the respective parties, and due deliberation being had in the premises, it is now ordered, adjudged, and decreed by the court that the said libel be, and the same is hereby, dismissed, and that unless an appeal be taken within time allowed by law and the rules and practice of this court, the clerk of this court pay out to the proctor of the libellant his portion of the taxed costs on deposit
26 herein, and that the remainder thereof be distributed among the officers of the court entitled thereto.

(Signed) WM. G. CHOATE.

Indorsed: "Filed January 5, 1881."

District Court of the United States for the Southern District of New York.

NORMAN H. POLLOCK
vs.
THE STEAMBOAT "LAURA," her Boilers, Engines, &c.; THE BRIDGEPORT STEAMBOAT COMPANY, Claimants and Respondents. } In Admiralty.

SIR: Please take notice that the above-named libellant, conceiving himself aggrieved by the final sentence or decree entered on the 5th day of January, in the above-entitled cause, doth hereby appeal therefrom to the next circuit court of the United States to be held in and for the said district; and he prays that this his appeal may be allowed, and that a transcript of the record and proceedings in the cause, duly authenticated, may be sent to the said circuit court.

Dated January 7, 1881.

HENRY G. ATWATER,
Proctor for Libellant.

S. H. LYMAN,
Clerk U. S. District Court, S. D. N. Y.

Indorsed: "Filed January 14, 1881."

27 *Petition of Appeal.*

Circuit Court of the United States, Southern District of New York.

NORMAN H. POLLOCK, Appellant,
ag'st
THE STEAMBOAT "LAURA," her Boilers, &c.; THE BRIDGEPORT STEAMBOAT COMPANY, Claimants, Respondents.

To the circuit court of the United States for the southern district of New York, in the second circuit:

The appeal of the above-named Norman H. Pollock respectfully shows:

I. That on October 6th, 1880, the appellant filed a libel in the United States district court, for the southern district of New York, against the steamboat "Laura," her boilers, &c., to recover two certain penalties under the United States Revised Statutes, §§ 4465 and 4469, for the taking on board of said steamboat more passengers than was allowed by her certificate of inspection, which penalties amounted to $5,661.

No process was issued on said libel, but on or about October 7th, 1880, the Bridgeport Steamboat Company appeared in the suit and claimed sole ownership of said vessel, and gave the ordinary stipulation by the claimant for costs, and for value, and on November 3d, 1880, filed an answer setting up various defenses to the libellant's claim, and on December 23d, 1880, a supplemental answer, setting up that since the commencement of the suit the Secretary of the Treasury had remitted the penalties sued for.

II. On January 4th, 1881, the cause came on for hearing
28 before Hon. William Choate, the district judge, and on proof of the granting of the warrant of remission set up in the claimant's supplemental answer, and of the compliance by the claimant with the conditions therein named, the said district judge refused to allow the libellant to give evidence of the facts stated in his libel, and dismissed the said libel, and on January 5th, 1880, a decree to that effect was entered.

III. This appellant is advised and insists that said decree was erroneous, because the Secretary of the Treasury had no power to remit the penalties which had been sued for in this case, and the said Norman H. Pollock, therefore, appeals from said decree to the next circuit court to be held in said district, and on said appeal he intends to have the said cause heard anew on the pleadings and proofs in the district court, and also on other proofs which he will introduce in the said circuit court.

The appellant, therefore, prays that the said decree and every part thereof may be reversed, and such a decree made in the premises as may be just, and to this end that the record and proceedings in the said district court may be certified to the circuit court according to law.

Dated January 22, 1881.

HENRY G. ATWATER,
Proctor for Libellant.

Indorsed: "Filed January 24, 1881.

Know all men by these presents:

That we, Norman H. Pollock, of the city of Brooklyn, in the county of Kings and State of New York, and George G. Nason, of the city of New York, in said State, are held and firmly bound unto The Bridgeport Steamboat Company in the sum of two hundred and fifty dollars, to be paid to the said The Bridgeport Steamboat Company, its successors or assigns; for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and
29 severally, firmly by these presents. Sealed with our seals, and dated the 15th day of January, in the year of our Lord, one thousand eight hundred and eighty-one.

Whereas Norman H. Pollock, as appellant, has appealed to the circuit court of the United States for the southern district of New York, in the second circuit, from a decree of the district court of the United States for the said southern district, bearing date the 5th day of January, 1881, in a suit in which Norman H. Pollock is libellant against The Steamboat "Laura," her boilers, &c.; The Bridgeport Steamboat Company, claimant:

Now, therefore, the condition of this obligation is such that, if the above-named appellant shall prosecute said appeal with effect, and pay all damages and costs which shall be awarded against him as such appellant therein if he shall fail to make said appeal good, then this obligation shall be void; otherwise, the same shall be and remain in full force and effect.

NORMAN H. POLLOCK. [SEAL.]
GEORGE G. NASON. [SEAL.]

Sealed and delivered and taken, and acknowledged as to Norman H. Pollock, this 18th day of January, 1881, before me.

[SEAL.] S. G. LEATHEM,
Notary Public, New York Co.

J. B. Nones, as to Geo. G. Nason, taken and acknowledged before me.

[SEAL.] J. B. NONES,
Notary Public, N. Y.

UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

George G. Nason, being duly sworn, deposes and says that he
30 resides in the city of New York, at 22 East Fiftieth street, and is a householder therein, and that he is worth one thousand dollars over and above all of his just debts and liabilities.

GEORGE G. NASON.

Sworn to, this 18th day of January, A. D. 1881, before me.

[SEAL.] J. B. NONES,
Notary Public, N. Y.

This bond approved as to form and amount and sufficiency of surety.

Dated New York, January 25, 1881.

D. & T. McMAHON,
Attorneys for Respondents and Claimants.

Indorsed: "Filed, January 25th, 1881."

U. S. District Court, Southern District of New York.

NORMAN H. POLLOCK *ag'st* THE STEAMBOAT "LAURA," &c.

CHOATE, J.:

This is a libel to recover penalties under Rev. Stat., § 4465, for carrying a greater number of passengers than the certificate of inspection permitted.

By R. S., § 4469, penalties so incurred are made a lien on the vessel. After the filing of the libel the claimants, who are owners of the steamboat, applied to the Secretary of the Treasury for a remission of the penalty, and after they had served their answer a warrant of remission was issued, wherein the Secretary, by the authority given him by Rev. Stat., 5294, remits to the petitioners, claim-
31 ants herein, "all the right, claim and demand of the United States, and of all others whatsoever, to the forfeiture of passage money and penalties on payment of costs, if any there be."

On the warrant of remission the claimant now moves for a perpetual stay of the libellant's suit, or for other relief. On the libellant's behalf it is objected that the warrant of remission is void for want of power in the Secretary to grant it. The section under which the warrant was issued (R. S., § 5294) is as follows: "The Secretary of the Treasury may, on application therefor, remit or mitigate any fine or penalty provided for in laws relating to steam vessels, or discontinue any prosecution to recover penalties denounced in such laws, excepting the penalty of imprisonment or removal from office, upon such terms as he, in his discretion, shall think proper; and all rights granted to informers by such laws shall be held subject to the Secretary's power of remission, except in cases where the claims of any informer to the share of any penalty shall have been determined by a court of competent jurisdiction, prior to the application for the remission of the penalty; and the Secretary shall have authority to ascertain the facts upon all such applications in such manner and under such regulations as he may deem proper." This section is a re-enactment without any substantial change of Stat. 1871, ch. 100, § 64 (16 St., 458), and the laws relating to steam vessels here referred to are, or at least include, the provisions of Title 52 of the Revised Statutes, entitled "Regulation of Steam Vessels," sections 4399 to 4500, of which are substantially a re-enactment of the Statute of 1871 above referred to.

It is argued that the power to remit or mitigate fines and penalties here given to the Secretary does not, upon a proper construction of § 5294, extend to the remission of a penalty given by the laws referred to, to any person suing for the same, after a suit therefor has been

commenced; that this power of remission after suit brought
32 does not apply at all to the case of a penalty in which the United States is not interested, which is the present case, and that the subsequent words in the statute clearly thus restrict the power of remission granted to the Secretary.

The argument is that the power to remit fines and penalties is a branch of the pardoning power, and that a statute conferring such power of remission should be construed with reference to the law governing the extent and limitations of the power to pardon; that by the settled law of England and this country the pardoning power cannot be so exercised as to take away or impair a vested private right or interest; that after suit brought in a popular action—that is, a suit for a penalty given by statute to any person suing for the same—the plaintiff acquires such a vested right or interest in the penalty that it cannot be impaired or taken away by a pardon; that what was before by the statute anybody's right, has become the plaintiff's by his appropriating the same in the mode prescribed by law by the bringing of his action; that this gives him such an interest in the penalty that no pardon could divest him of that interest.

The general proposition that the power to pardon is subject to such a limitation as is thus contended for, is well supported by the authorities. (Howell *vs.* James, 2 Str., 1272; Coke, 3 Inst., 236, 237, and 238; U. S. *vs.* Harris, 1 Abb., U. S., 110; U. S. *vs.* Lancaster, 4 Wash. C. C., 66; Shoop *vs.* The Commonwealth, 3 Pa. St., 126; Rowe *vs.* The State, 2 Bay [S. C.], 565.) Nor does our law of pardons differ from the English (*Ex parte* Wells, 18 How., 307). It seems also that the bringing of an action for a penalty given by statute to any person suing for the same creates an interest which a pardon cannot take away (Coke, 3 Inst., 237). But the question here is one of the construction of the statute. Whatever power of remission in the Secretary Congress chooses to annex as a condition to the grant of the penalties given, is not
a power to pardon, but is simply a restriction, limitation or
33 condition annexed to the grant of the penalty (4 Wash. C. C., 67). If this were a statute conferring the power to pardon offences against the United States it must, of course, be construed with reference to all those limitations and restrictions which attach to the power to pardon. The power to pardon appears to be vested by the Constitution in the President alone. (Art. 2, § 2.) But this statute, not being a statute regulating the exercise of the power to pardon, must be construed not with reference to the restrictions on the power to pardon but in all points doubtful or obscure with reference to the principle of public policy which dictated its enactment, so far as that principle may be discovered from the law itself and the purposes aimed to be accomplished by it, and from other statutes in *pari materia*. And the mere fact that the words in which the powers granted are expressed would be appropriate in a statute granting a power to pardon, if such a statute were possible, is no reason for applying to them the strict limitations to which they would be liable in such a statute unless such limitations are also called for by the principle of public policy intended to be subserved by the enactment, or for the purpose of giving it a fair and reason-

able application to the subject-matter legislated upon. Applying this rule to the reading of this statute, I think it is clear that the power to remit or mitigate penalties extends as well and as fully to penalties given to the person suing for the same as to those given to the United States, or one-half to the Government and one-half to the informer, all of which classes of penalties are given in Title 52 of the Revised Statutes. I think there is no reason to construe the statute as giving to the Secretary alternative powers, as claimed by libellant's counsel, first, as to cases where no suit has been instituted, a power to remit or mitigate the penalty, to be exercised only before suit brought, and, secondly, if a suit has been instituted, a power
34 to discontinue the suit. The word or may, it is true, be used in such a sense as indicating that the power is to do one only of two things; but quite as frequently the use of the word denotes that the power granted is to do either, that is to say, both of the two things mentioned. Thus, here the reading that is called for, as well by the text of the law as by the evident purpose to be subserved by the statute, is, that as to all the penalties referred to, except those which are purely punitive, as imprisonment or removal from office—that is to say, as to all pecuniary penalties given by the statute—the Secretary has power, on ascertaining the facts, to remit or mitigate the same, and, if a suit has been commenced, to discontinue it. The additional power given to discontinue any prosecution to recovery of penalties may, perhaps, be applicable, as argued, only to suits in which the United States is plaintiff; but the addition of this power only in such cases, which is rather the means, or one means, of carrying into effect a remission, than a power to remit or mitigate, does not impair or take away the larger and more general power to remit or mitigate, which is expressly extended to all the pecuniary penalties of the statute, without exception. It seems to be doing violence to the meaning of the statute to infer, from its terms, that while the Secretary can mitigate or reduce the amount of the penalty before suit brought, yet after suit brought he can do nothing but discontinue the suit; that he has not power to let it go on to judgment for the reduced penalty. Nor can any sound reason be suggested for presuming an intent of the Legislature to discriminate between a case where suit has been brought in which half the penalty will go to the informer in the event of a judgment, which is undoubtedly subject to remission, even after suit brought, and a case where the whole of the penalty will go to him. The vesting of an interest in the informer by the beginning of the suit is the same in either case, and the evil intended to be guarded
35 against by giving these powers to the Secretary is the same in either case, or, if possible, the mischief is greater where the entire penalty goes to the informer. The obvious and humane purpose to be attained by this grant of power was to enable some responsible officer of the Government, upon examination into the facts of the particular case, to prevent these penalties, some of which are severe, and might be ruinous, from being used oppressively in cases where the violation of law was technical, unintended, accidental, or without such criminal or bad intent as to

be deserving of severe punishment, and also to prevent them from being inequitably applied for the satisfaction of the cupidity of informers. The power given to ascertain the facts implies that the power is to be exercised with reference to the facts ascertained, and not arbitrarily by the Secretary. The power is similar to that exercised by the same officer in case of penalties and forfeitures under the customs revenue laws, where the power to remit or mitigate is to be exercised only where the forfeiture is incurred without willful negligence or intent to defraud (see original law on this subject, St. 1797, ch. 13; 1 Stat., 596). While this precise limitation is not imposed on him in the present class of cases, yet no doubt his power is to be exercised *quasi*-judicially, and not as mere matter of grace, or arbitrarily and without substantial grounds of equity and justice. It would, in my opinion, take from the statute a very important fact of its beneficial operation to hold that, after suit brought by an informer in one of these cases like the present, where the whole penalty is given to him, the power to remit or mitigate was gone.

Probably in most cases the first knowledge which the owners of the vessel would have of a violation of the statute by the master, whether intentional on his part or not, would be the commencement of the action perhaps for an enormous penalty. Thus, to give this construction to the act would, in effect, defeat its purpose and
36 intent, and the language of the act itself requires no such strict or limited construction. Great reliance is, however, placed by the learned counsel for the libellant upon the point made by him, that the plaintiff in a popular action, that is, one who sues for a penalty given to any person suing for the same, is not, properly speaking, "an informer," and hence it is argued that, as the statute expressly provides that the rights of an "informer" are held subject to the power of the Secretary to remit or mitigate the penalty, at any time before the informer's claim to a share in the penalty shall have been determined by a court of competent jurisdiction, it cannot have intended that a plaintiff, thus suing on his own behalf, should hold his right to the penalty subject to the same liability to have it cut off by remission. This argument, however, proceeds upon a mistake as to the meaning of the word "informer." The plaintiff in a popular action is an "informer," as that word is understood in the law and used in the statutes of England and of this country. Thus Blackstone says, speaking of statutory penalties: "The usual application of these penalties or forfeitures is either to the party aggrieved, or else to any of the Queen's subjects in general. But more usually the forfeitures created by statute are given at large to any common informer; or, in other words, to any such person or persons as will sue for the same; and hence such actions are called popular actions, because they are given to the people in general. Sometimes one part is given to the Crown, to the poor, or to some public use, and the other part to the informer or prosecutor, and then the suit is called a *qui tam* action, because it is brought by a person '*qui tam pro domino rege, &c., quam pro se ipso in hac parte sequitur*'" (3 Bl. Com., 4th Eng. ed. [Kerr], p. 149).

In the year 1576 (18 Eliz., ch. 5), Parliament passed an act enti-

tled "An act to redress disorders in common informers," which commences as follows: "For redressing of divers disorders in com-
37 mon informers, and for better execution of penal laws, be it enacted that every informer, upon every penal statute, shall exhibit his suit in proper person, &c., and that none shall be admitted or received to pursue against any person or persons upon any penal statute, but by way of information or original action, and not otherwise." This act carefully regulates all such informations and actions, and by sections 6 and 7 suits upon penalties given to any certain person, or body politic or corporate, and suits by any officer who has been used to maintain such suit, are excepted from its operation, leaving it, in fact, to apply only to popular actions, or, as it is expressed in the statute, suits upon penalties "limited or granted generally to any person that will sue." The Legislature of New York passed a very similar act for the regulation of suits on penal statutes (Stat., 3 Feb., 1788). It is entitled "An act to redress disorders by common informers, and to prevent malicious informations." By the tenth section its operation is restricted to suits where the penalty is by statute given to "any person suing for the same" (N. Y. Laws, J. & V., 188). In his History of the English Law (p. 509), Crabb says, speaking of the time of Elizabeth: "Owing to the number of penal statutes which now existed, and the encouragement which they held out to needy persons to bring informations for the sake of the forfeitures, two statutes were made in this reign, namely, in the 18th and 31st year of this queen, for the purpose of regulating this troublesome description of people, and in some instance inflicting corporal punishment on such persons, if convicted of malicious or oppressive proceedings. Among other things, compounding informations on penal actions, that is, taking any money or promise from the defendant, without leave of the court, by way of making a composition with him not to prosecute, subjected the offender to a penalty of £10, two hours standing in the pillory, and to be forever disabled from suing such popular action. On
38 the subject of these informations it is worthy of remark that no prosecution could be brought by any common informer after the expiration of a year from the commission of the offense." These instances are surely sufficient to show that the plaintiff in a popular action, whether prosecuting by information or by original writ, was an informer within the well-understood meaning of that word. The word seems clearly to include such a plaintiff also, as it is used in the act of Congress of Feb. 28, 1799, which provides, in section 8, "that if any informer on a penal statute, and to whom the penalty, or any part thereof, if recovered, is directed to accrue, shall discontinue his suit or prosecution, or be nonsuited, &c.," he shall be liable for certain fees (1 Stat., 626). In its origin the word "informer" may have meant only one who sues by way of an information, but, as is seen by the statute of 18th Elizabeth, this was not the only mode of suing for penalties, and in time, certainly, if not originally, a party so suing, in whatever mode, was known as an informer. The word also, no doubt, in some of its applications, includes a person who lodges information with a Government officer

which leads to a suit brought by the Government itself. It is so used in the customs revenue laws. But that the word includes also the plaintiff in a popular action is very evident from the authorities cited above; nor does it seem to me that the reference to the share of the informer in this proviso has any important bearing on this question. When the whole penalty, as in this case, goes to the informer his share is the whole. It is not a misuse of the word, even if intended to apply to this class of informers. There is no statute which has been cited, or which I have discovered, which in any respect discriminates in favor of or for the greater protection of this class of informers. On the contrary, the statute of 18th Elizabeth, and the New York act of 1788, show that this very class of informers has been regarded as the least entitled to favor,
39 and as requiring, in a greater degree than any other class, stringent, legal, and legislative regulation. And it would be clearly a violation of that principle of public policy which governs this subject-matter to give this statute a strained construction for their benefit, or to base an inference that they were intended to be excepted out of its beneficial operation upon anything so inconclusive in their favor as what is contained in section 5294.

Taking the whole statute together, then, I think it subjects all pecuniary penalties to the Secretary's power of remission, provided the informer's claim shall not have been actually determined by the court. The power was, therefore, rightfully exercised in this case. Where the suit is by the United States, though prosecuted partly for the benefit of the informer, the Secretary has power to discontinue it. In this case the warrant of remission does not purport to order the discontinuance of the suit, and probably it is proper that it should not do so, because it is the suit of a private party; but the court is bound to give effect in some proper way to the remission which the Secretary had the power to make. The precise question involved in this case seems to have been decided by Judge Blatchford in the case of the "Twilight," in December, 1875. In that case, after issue joined in a suit for a similar penalty, the secretary remitted the penalty on certain terms, "subject to the decision of the court as to whether the plaintiff is an informer under section 5294 of the Revised Statutes, and the forfeiture incurred under section 4465 of said statute is remissible by the Secretary of the Treasury." It appears, by the record in that case, that after hearing the parties the court made an order perpetually staying the libellant's prosecution of the suit. As no opinion was filed, nor any briefs, it may be true, as claimed by the libellant's counsel, that the points made in this case for libellant were not presented to the court in that case.

As the amount claimed is large, I think it is better, in view
40 of a probable appeal, that an order be entered giving the claimant leave to file a supplemental answer setting up the remission as a defense to the suit.

The libellant has filed exceptions to the answer of the claimant, a corporation which appeared and defended as owner of the steamboat. Two causes of action are stated in the libel; first, taking on board on one trip 280 passengers in excess of the number allowed

by the certificate; and, secondly, taking on board on another trip 275 in excess of that number. The answer, while admitting the allegations of the libel as to the number the vessel was allowed to carry by her certificate, neither admits nor denies the allegation as to the number taken on board in excess of that number, and leaves the libellant to prove the allegations in that behalf, insisting that the claimant is not required to answer further, on the ground that its answer "might and would tend to subject it to a penalty or forfeiture." To this part of the answer the libellant excepts, and now insists that the claimant must admit or deny the fact alleged. I think the case is within the 31st Admiralty rule, which is as follows: "The defendant may object by his answer to answer any allegation or interrogatory contained in the libel which will expose him to any prosecution or punishment for a crime, or for any penalty or any forfeiture of his property for any penal offense." It is argued that this rule is designed to protect a party against his admission of a penal offense being used against him as a party to a criminal or penal prosecution in some other suit or some other court. Possibly this was the prominent point in view when the rule was framed, but I do not see why its terms are not equally applicable to a case where in the very same suit the defendant called on to answer will be subjected to the like evil consequence of admitting the fact. In reality this rule seems to be but an application of the provision in the Constitution of the United States which provides that "No
41 person shall be compelled in a criminal case to be a witness against himself." (Amend. V.)

This provision applies to suits on penal statutes for a pecuniary penalty only. (Bank of Salina *vs.* Henry, 2 Den., 155; 3 *Id.*, 593; Curtis *vs.* Knox, 2 Den., 341; Burns *vs.* Kempshall, 24 Wend., 360; 4 Hill, 468; Cloyes *vs.* Thayer, 3 Hill, 566; Parkhurst *vs.* Lowten, 1 Mer., 401.)

This provision of the Constitution is but an adoption as a constitutional guaranty of a principle of the common law, and, as a rule of the common law, it was as broad as the rule in admiralty referred to, extending to cases of a mere liability to pecuniary forfeiture. (Same cases, 2 Story, Com. Const., § 1788, 4th ed.)

Another point taken in support of this exception is, that the rule does not apply to a corporation, but only to a natural person. I see no valid reason for this distinction. The property of a corporation is equally under the protection of the Constitution with that of a natural person. Its admission of a fact tending to criminate it would equally subject it to a judgment for a penalty or forfeiture, and thus deprive it and its stockholders of its and their property in the same manner in which the admission of a natural person would do, and that, too, in a proceeding which, for this purpose, is *quasi*-criminal and is within the meaning of the fifth amendment to the Constitution of the United States, and certainly within the thirty-first admiralty rule. This exception is, therefore, overruled.

The libellant also excepts to the third article of the answer which, in brief, sets up as a defense to the suit, that the claimant received an oral permission to run upon excursions under R. S., § 4466, and

to carry five hundred passengers, which was more than she had on board, but that through negligence the permission was not given in writing. Rev. Stat., § 4466, requires the permission
42 for the extra number allowed to be in writing. Of course, an unwritten permission is wholly immaterial, and cannot avail as a defense. This exception is sustained.

Henry G. Atwater, for libellant.
D. McMahon, for claimant.

December 14, 1880.

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, Samuel H. Lyman, clerk of the district court of the United States of America for the southern district of New York, do hereby certify that the writings annexed to this certificate are true copies of their respective originals on file and remaining of record in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, this eighth day of February, in the year of our Lord one thousand eight hundred and eighty-one, and of the Independence of the said United States the one hundred and fifth.

[L. S.] SAM'L H. LYMAN, *Clerk.*

[Endorsed:] U. S. circuit court. Filed Feb'y 8, 1881. Joseph M. Deuel, clerk.

43 Circuit Court of the United States for the Southern District of New York.

NORMAN H. POLLOCK
against
THE STEAMBOAT "LAURA," Respondent.

In this case I find the following facts:

On the thirty-first of May, 1880, the steamboat Laura, then a vessel propelled wholly by steam, and not a public vessel of the United States, nor a vessel of any other country, nor a vessel propelled in whole or in part by steam for navigating canals, and also then a steam-vessel navigating waters of the United States, which then were highways of commerce and open to competitive navigation, and also then a steam-vessel within the meaning of, and subject to the provisions of, Title 52 of the Revised Statutes of the United States, entitled "Regulation of Steam-vessels," and which had theretofore been duly inspected both as to her hull and as to her boilers, and to which a certificate of inspection had been granted on or about July 2, 1879, in accordance with the provisions of said title, in which certificate of inspection it was stated that said vessel had suitable accommodations for and was allowed to carry 142 passengers, carried as passengers on board of her from Bridgeport, in the State

of Connecticut, to the city of New York, in the State of New York, 422 passengers. On the same day the said vessel carried as passengers on board of her from the said city of New York to Bridgeport, aforesaid, 417 passengers. Each of the said 839 passengers paid or became liable for the sum of at least 20 cents as passage money.

On the seventeenth of November, 1880, The Bridgeport Steamboat Company, a corporation, the owner of the said vessel, received, on its application therefor, a warrant of remission from the Secretary of the Treasury of the United States, of which the following is a copy:

Warrant of Remission.

To all to whom these presents shall come, I, John Sherman, Secretary of the Treasury of the United States, send Greeting:

Whereas a petition, bearing date the eighteenth day of October, 1880, has been made before me by the Bridgeport Steamboat Company, by J. B. Hubbell, superintendent, for the remission of a forfeiture of the passage money and certain penalties, amounting to $5,661, alleged to have been incurred by the steamboat Laura, on the thirty-first day of May, A. D. 1880, by carrying an excess of passengers over the number allowed by law, viz., on a trip from Bridgeport to New York 280 passengers in excess, and on a trip from New York to Bridgeport 275 passengers in excess under the Re-
44 vised Statutes of the United States, §§ 4465 and 4469; and whereas, I, the said Secretary of the Treasury, having maturely considered the said petition, and being satisfied that the said offences were committed without wilful negligence, or intention to evade the requirements of the law, and that no danger to human life was caused thereby. Now, therefore, know ye, that I, the said Secretary of Treasury, in consideration of the premises, and by virtue of the power and authority to me given by the 5294th section of said statutes, do hereby decide to remit to the petitioner all the right, claim, and demand of the United States, and of all others whatsoever, to said forfeiture of passage money and penalties, on payment of costs, if any there be. Given under my hand and seal of office, in the city of Washington, the seventeenth day of November, in the year of our Lord one thousand eight hundred and eighty, and the one hundred and fifth year of the Independence of the United States.

"[SEAL.] JOHN SHERMAN,
"*Secretary of the Treasury.*"

The costs were taxed and paid into the district court by the claimant. This suit was commenced in the district court October 6, 1880. The answer was filed November 3, 1880. The exceptions to the answer were filed November 11, 1880. The order disposing of said exceptions was filed December 22, 1880. The supplemental answer was filed December 23, 1880. The exceptions to the supplemental answer were filed December 29, 1880. The order disposing of said exceptions was filed January 5, 1881. The final decree was filed on

the same day. The appeal of the libellant is only from that decree, and is made on the ground that the Secretary of the Treasury had no power to remit the penalties sued for in this case.

On the foregoing facts I find, as a conclusion of law, that the said warrant of remission is a complete discharge of said penalties and passage money, and that the claimant is entitled to a decree that the libel be dismissed; that the clerk of this court pay out to the proctor for the libellant his portion of the taxed costs of the libellant in the district court on deposit herein; that the remainder thereof be distributed among the officers of the district court entitled thereto; and that the libellant pay to the claimant its costs in this court, to be taxed.

SAMUEL BLATCHFORD,
Circuit Judge.

BLATCHFORD, *J.*

This suit is founded on sections 4465 and 4469 of the Revised Statutes. The former section provides as follows:

"It shall not be lawful to take on board of any steamer a greater number of passengers than is stated in the certificate of inspection; and for every violation of this provision the master or owner shall be liable to any person suing for the same, to forfeit the amount of passage money, and $10 for each passenger beyond the number allowed."

The latter section provides that the penalties imposed by the former section "shall be a lien upon the vessel, * * * but a bond may, as provided in other cases, be given to secure the satisfaction of the judgment." The provisions of section 5294, under which the warrant of remission in this case was granted, are as follows:

45 "The Secretary of the Treasury may, upon application therefor, remit or mitigate any fine or penalty provided for in laws relating to steam vessels, or discontinue any prosecution to recover penalties denounced in such laws, excepting the penalty of imprisonment or of removal from office, upon such terms as he in his discretion shall think proper; and all rights granted to informers by such laws shall be held subject to the Secretary's power of remission, except in cases where the claims of any informer to the share of any penalty shall have been determined by a court of competent jurisdiction prior to the application for the remission of the penalty; and the Secretary shall have authority to ascertain the facts upon all such applications in such manner and under such regulations as he may deem proper."

Title 52 of the Revised Statutes, in which sections 4465 and 4469 are found, is entitled "Regulation of Steam Vessels." Those sections and section 5294 were originally enacted as part of the act of February 28, 1871, entitled "An act to provide for the better security of life on board of vessels propelled in whole or in part by steam, and for other purposes," (16 U. S. Stat. at Large, 440;) section 4465 being

a part of section 48 of that act, and section 4469 being a part of section 49, and § 5294 being, in substance, section 64.

It is contended for the libellant that the warrant of remission is void and of no effect, because section 5294 is unconstitutional in that it infringes on the pardoning power vested in the President. The Constitution (Article 2, § 2) provides that the President "shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment." It is contended that this power is exclusive, and that Congress cannot lawfully grant to the Secretary of the Treasury the power conferred on him by section 5294.

The power of the President to pardon has always been construed to extend to the remission of fines, penalties, and forfeitures accruing to the United States for offences against the United States. (Op. Att'ys Gen., 418.)

In United States *v.* Lancaster (4 Wash. C. C. R., 64), a vessel had been seized by the collector, and libelled for forfeiture, for a violation of the embargo laws, and released on a bond for her value. She was condemned as forfeited, and a suit was brought by the United States on the bond. Afterwards the President remitted to defendant all the right and interest of the United States in and to said bond, and required all proceedings on the part of the United States to be forthwith discontinued. The question arose in the suit whether the pardon of the President affected the rights of the officers of the customs to the moiety of the forfeiture. It was held that the terms of the pardon were such as to remit only the interest of the United States, and not the rights of the officers.

46

The question as to the power of the President, by pardon, to defeat the inchoate rights of the officers was not passed upon.

In U. S. *v.* Morris (10 Wheat., 246) it was held that the interests of officers of the customs in forfeitures were subordinate to the authority of the Secretary of the Treasury, under section 1 of the act of March 3, 1797, (1 U. S. Stat. at Large, 506, now section 5292 of the Revised Statutes,) to remit them. In the case of a vessel condemned as forfeited to the United States for a violation of the slave trade act, the President was advised to remit only the interest of the United States, on the ground that his pardon could not defeat the vested rights of the seizing officer. (4 Op. Att'ys Gen., 573.) On the question whether the President had the power to pardon offences committed by the owners or masters of steam vessels in respect to the transportation of passengers in violation of certain statutes, he was advised that he had such power; and the question whether he had authority to remit, by pardon, a penalty accruing to individuals, was suggested, but not discussed. (6 Id. Att'ys Gen., 393.) In the case of a vessel arrested for violating a statute in regard to the transportation of passengers, a remission being applied for to the Secretary of the Treasury, under section 1 of the act of March 3, 1797, the question occurred whether the case came within the pardoning power of the President. The Secretary was advised—

(1) That the President had power to pardon the imprisonment, fines, and forfeitures imposed for violating the provisions in regard

to space for, and number of, passengers, unless, perhaps, as regarded a forfeiture, the right of which had duly vested in the custom-house officers, or others, except the United States; (2) that it was doubtful whether the President had power to remit such forfeiture; (3) that the Secretary of the Treasury had power to remit all forfeitures of vessels for carrying an excess of passengers; (4) that the President had power to pardon in all cases of vessels libelled by reason of liens on them for penalties imposed by the statute; (5) that the Secretary of the Treasury had the concurrent power to remit in the last-named cases, but any doubt could be cured by the authority of the President, as no interest but that of the United States was affected; (6) that as the act of 1797 afforded the means of judicial investigation as to the question of remission, it was more convenient in the cases of seizures, and prosecutions instituted by officers of the customs, to dispose of that class of seizures in that way than to refer them to the unaided discretion of the President. (6 Id., 488.)

In United States *v.* Harris (1 Abb. U. S. Rep., 110,) a person was convicted and fined for violating the internal revenue law. Afterwards the court adjudged that H. was the informer, and that one-half of the fine should be for his use and the remainder for
47 the use of the United States. Afterwards, the President, by a pardon, remitted to the defendant the payment of two-thirds of the fine. One third of the fine, with interest, was paid into court. The informer claimed, and was allowed by the court, therefrom the whole sum adjudged to him, on the ground that the President had no right to remit any of the part of the fine so adjudged to the informer, and that he was entitled to the whole of such part as if there had been no remission. The conviction was under a statute, (act of June 30, 1864, § 41, 13 U. S. Stat. at Large, 239,) which provided that all suits for fines under it should be in the name of the United States. The court remarked that where the prosecution was wholly in the name of the United States it saw nothing in any of the authorities which denied to the President the power, by pardon, to remit the interest of an informer before judgment.

The view urged by the libellant is that the power of the President to pardon is exclusive; that no part of it can be exercised by any one else without infringing on the power of the President; that if the Secretary of the Treasury can pardon without the President's concurrence, he may grant pardons which the President would refuse; that if Congress can authorize the Secretary to grant pardons, it can itself grant them, and prescribe the terms and conditions under which they shall be granted; and that if it can authorize the Secretary to remit penalties incurred under the statute in question, it can authorize him, or any one else, to remit the punishment of any offence, and can so legislate that after the President has refused to grant a pardon it can still be granted under authority conferred by Congress. In support of this view, the case of *Ex parte* Garland, (4 Wall., 333,) is cited, as holding that the power of the President to pardon is unlimited, extending to every offence known to the law,

and not subject to legislative control, and that Congress can neither limit the effect of such pardons or exclude from its exercise any class of offenders. The case of United States *v.* Klein, (13 Wall., 128,) is also referred to, as holding that Congress cannot impair the effect of a pardon, because that would be to infringe the constitutional power of the President.

There is not, in this case, any question raised as to the effect of a pardon which has been granted by the President, as there was in *Ex parte* Garland and in United States *v.* Klein. The question is not as to any restriction of the pardoning power of the President. It is not claimed that the Secretary alone could remit this forfeiture, and that the President could not. The practice of the Government, as is seen from the citations, has been to regard the power of the Secretary
48 to remit penalties and forfeitures, of the character of those in the present case, as a valid power, in concurrence with the power of the President to pardon in the same cases. The existence of the power in the Secretary is not regarded as interfering with the pardoning power of the President. The decision in United States *vs.* Morris (10 Wheat., 246), that the Secretary's remission of the entire forfeiture—the vessel having been seized as forfeited to the United States, and prosecuted in the name of the United States, and condemned—had the effect to extinguish the interest of the officers of the customs in the property, necessarily recognized the fact that the power of the Secretary to remit was a valid power, and did not infringe on the pardoning power of the President. A power in the Secretary to remit penalties and forfeitures has existed by statute since 1790, and has never been regarded as invalid because of the existence of the power in the President to remit, by pardon, the same penalties and forfeitures. Even assuming, then, that the President could discharge, by pardon, the interest of the libellant in the forfeiture of this vessel, it does not seem that the Secretary could not be lawfully authorized to discharge it.

But it may well be doubted whether the President's power of pardon extends to taking away the interest given by the statute to the libellant. If so, then there is no power of pardon to be interfered with by the remission of the Secretary. The statute gives nothing to the United States. It does not authorize any prosecution by the United States by indictment or by civil suit. It imposes a penalty, which is made a lien on the vessel, for doing what it declares it shall not be lawful to do; but the penalty is declared to be a pecuniary liability, not to the United States, but to any one who will sue for it. It is wholly to such person. While the unlawful act which gives rise to the suit, if to be called an offence, is one denounced by a statute of the United States, yet it may well be doubted whether it is an offence against the United States in the sense of the Constitution; and, still more, whether, if the United States could sue for the penalty which is given to "any person suing for the same," there is any offence against the United States which can be pardoned by the President beyond what is involved in such right of the United States to sue. The power, however, of the President to pardon has never been construed to extend to taking away such rights as the statute

in this case vests in the libellant, where they have been asserted by a suit brought by an informer in his own name, and where they belong wholly to him, and the United States have no share
49 in the penalty. The case of United States *vs.* Harris (*supra*) refers to the power of the President over the whole case, before judgment, as existing only where the prosecution is wholly in the name of the United States.

There is, therefore, nothing in the existence of the pardoning power which affects the present case. This being so, there can be no doubt that Congress, which created the penalty, could provide any method of remitting it.

The next question is as to the construction of section 5294. It is contended for the libellant that that section does not give to the Secretary power to remit a penalty after a suit has been brought by a private person to recover it. The matter is a very plain one. The power extends to "any fine or penalty;" that is, to all fines and penalties. It includes those given to individuals as well as those given to the United States. Probably, because of a doubt whether the pardoning power of the President could reach all cases, and because cases proper for remission would arise the power of remission was confided to the Secretary, to be exercised on an ascertainment of facts, with the restrictions, however, that the power should not extend to remitting the penalty of imprisonment, or of removal from office, or to affecting the rights of informers, after they had been judicially determined before the application for remission.

It is contended that the power to remit is restricted by the statute, after suit, to cases where the suit is by the United States and under the control of its officers. It is also contended that the power given to remit applies only to cases before suit is brought, and that the power to discontinue prosecutions is limited to prosecutions brought by the United States. These views do not seem well founded. The statute covers the remission of "any" fine or penalty, and although, under the words "discontinue any prosecution," the Secretary should be held to be restricted to discontinuing prosecutions in the name of the United States, yet he may remit any penalty.

The limitation of the power of discontinuing prosecutions does not restrict the power of remission. A prosecution may be discontinued without remitting the penalty, and there may be reasons for doing so; but no reason is perceived why the power to "discontinue any prosecution" does not include a suit like the present. There is nothing in section 5294 to suggest that the power of remission or of discontinuance was not intended to be as broad as the imposition of penalties, except as to the particular matters specially excepted.

It is argued that the libellant is not an informer, within section 5294, because he is not a person on whose information the
50 United States bring suit. But this is too restricted a meaning of the word. When the section speaks of "rights granted to informers by such laws" it means rights granted to individuals, and not to the United States. The libellant is none the less an informer because he sues in his own name, and is entitled to the whole penalty. The object of the statute was to provide in favor of the

party incurring the penalty a mode of mitigating it, and the mischief sought to be remedied was the same whoever was to receive the penalty. In section 976 the person to whom the whole of a penalty in a penal statute is directed to accrue, and who sues for it in his own name, is called an "informer." The suggestion that in section 5294 only a person who is entitled to part of a penalty is an informer is too narrow a view. If a person has the whole of a penalty he has all its shares, and his claims are fairly included within the words "the claims of any informer to the share of any penalty." A person may be an informer without being a "plaintiff on a penal statute," in the sense of section 975; but a "plaintiff on a penal statute," such as the libellant is, is an informer within section 5294.

The fact that by section 41 of the act of August 30, 1852, (10 U. S. Stat. at Large, 75,) in regard to steam-vessels, all the penalties imposed by it were given to any person who would sue for them, and that no power of remission of penalties was given by that act, has no tendency to show that under the act of 1871 all penalties, some of which are to go wholly to the informer and some partly to the informer and partly to the United States, are not within the power of remission given to the Secretary.

The warrant of remission must be held to be a complete discharge of the penalties and the passage money sued for in this case, and there must be a decree dismissing the libel and directing the clerk of this court to pay out to the proctor for the libellant his portion of the taxed costs of the libellant in the district court, on deposit herein, and to distribute the remainder thereof among the officers of the district court entitled thereto, and ordering that the libellant pay to the claimant its costs in this court, to be taxed.

Henry G. Atwater, for the libellant.
Dennis McMahan, for the claimant.

50½ (Endorsed:) Circuit court of the United States for the southern district of New York. Norman H. Pollock *vs.* The Steamboat Laura. Decision. U. S. circuit court. Filed Sept. 12th, 1881. Joseph M. Deuel, clerk.

51 At a stated term of the circuit court of the United States of America for the southern district of New York, held at the United States court-rooms, in the city of New York, on the 24th day of September, in the year of our Lord one thousand eight hundred and eighty-one.

Present: Hon. Samuel Blatchford, circuit judge.

NORMAN H. POLLOCK, Libellant & Appellant,
vs.
THE STEAMBOAT "LAURA," (THE BRIDGEPORT STEAMBOAT COMPANY), Claimant & Respondent. } In Admiralty.

On appeal from the dist. court for the southern dist. of N. Y.

This case having been heard on the apostles, and the further proof taken in this court, and after having been submitted on

printed points by the advocates for the respective parties, and due deliberation being had in the premises—

It is now ordered, adjudged and decreed by the court—

1. That the libel herein be, and the same hereby is, dismissed.

52 2. That the clerk of this court pay out to the proctor for the libellant his portion of the taxed costs of the libellant, in the district court on deposit herein, and that the remainder thereof be distributed among the officers of the district court entitled thereto.

3. That the libellant pay to the claimant its costs in this court, to be taxed.

SAM'L BLATCHFORD.

(Endorsed:) U. S. circuit court. Norman H. Pollock ag'st The Steamboat "Laura," (The Bridgeport Steamboat Company). Decree. H. G. Atwater, lib'l't's proctor, 71 Wall St., N. Y. city. U. S. circuit court. Filed Sep. 27th, 1881. Joseph M. Deuel, clerk.

53 *Petition of Appeal from Circuit Court to Supreme Court.*

NORMAN H. POLLOCK, Libellant and Appellant,
ag'st
THE STEAMBOAT "LAURA," her Boilers, &c. (The Bridgeport Steamboat Co., Claimants and Respondents).

To the Supreme Court of the United States:

The appeal of the above-named Norman H. Pollock respectfully shows:

I. That on October 6th, 1880, the appellant filed a libel in the United States district court for the southern district of New York, against The Steamboat "Laura," her boilers, &c., to recover two certain penalties under the United States Revised Statutes, §§ 4465 and 4469, for the taking on board of said steamboat more passengers than was allowed by her certificate of inspection, which penalties amounted to $5,661.

No process was issued on said libel, but on or about October
54 7th, 1880, the Bridgeport Steamboat Company appeared in the suit and claimed sole ownership of said vessel, and gave the ordinary stipulation by the claimant for costs and for value, and on November 3rd, 1880, filed an answer setting up various defenses to the libellant's claim, and on December 23rd, 1880, a supplemental answer, setting up that since the commencement of the suit the Secretary of the Treasury had remitted the penalties sued for.

II. On January 4th, 1881, the cause came on for hearing before Hon. William G. Choate, the district judge, and on proof of the granting of the warrant of remission set up in the claimants' supplemental answer, and of the compliance by the claimant with the conditions therein named, the said district judge refused to allow the libellant to give evidence of the facts stated in his libel and dismissed the said libel, and on January 5th, 1880, a decree to that effect was entered.

III. The libellant appealed from said decree of the district
55 court to the circuit court for the southern district of New York, and the said cause was removed thereby into said circuit court, and in the said circuit court the libellant took proof by depositions to show the incurring of the alleged penalties, and the said cause was tried anew in the said circuit court, and the said circuit court on such trial found as a matter of fact that the said steamboat "Laura" had carried the excess of passengers as alleged in the libel, but decided that the warrant of remission granted by the Secretary of the Treasury was a bar to the recovery of the penalties claimed, and thereupon on September 27th, 1881, made a decree dismissing the libel with costs against the libellant in the circuit court, which said decree of the said circuit court is, as this appellant is advised, erroneous and ought to be reversed, because the said warrant of remission was without authority of law and void, and was not a bar to the recovery of the penalties sued for.

56 Wherefore the appellant appeals from the whole of said decree of said circuit court to the Supreme Court of the United States, and respectfully prays that the record of the said decree and the pleading, evidence, and proceedings in the circuit court may be sent to the Supreme Court without delay, and that the said Supreme Court will proceed to hear the said cause anew, and that the said decree of the circuit court and every part thereof may be reversed and a decree made according to the prayer of the libel herein, or such other decree as to the said Supreme Court shall seem just.

Dated Oct. 3rd, 1881.

HENRY G. ATWATER,
Proctor for Appellant.

57 [Endorsed:] Norman H. Pollock ag'st The Steamboat "Laura" (The Bridgeport Steamboat Co., claimant and respondents.) Petition of appeal from the circuit court to the Supreme Court. H. G. Atwater, proctor for appellant, 71 Wall St., N. Y. city. We admit due service of the within petition of appeal. N. Y., November 1st, 1881. Filed November 1st, 1881.

58 Know all men by these presents, that we, George G. Mason and Henry G. Atwater are held and firmly bound unto the Bridgeport Steamboat Company in the penal sum of six hundred dollars, lawful money of the United States of America, to be paid to the said company, its successors or assigns; for which payment, well and truly to be made, we bind ourselves and our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals; dated the second day of November, one thousand eight hundred and eighty-one.

Whereas in a certain suit by Norman H. Pollock, libellant and appellant, against The Steamboat "Laura" (The Bridgeport Steamboat Company, claimant & respondent) the said appellant has prosecuted an appeal to the Supreme Court of the United States at Washington, to reverse the decree rendered in said suit on September 27th, 1881 by the circuit court of the United States for the southern district of New York:

59 Now, therefore, the condition of this obligation is such that, if the above-named appellant shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his appeal good, then this obligation shall be void, and otherwise it shall be of full force and effect.

GEORGE G. MASON. [SEAL.]
HENRY G. ATWATER. [SEAL.]

Sealed & delivered in the presence of—
S. A. EMANUEL.
J. B. NONES.

SOUTHERN DISTRICT OF NEW YORK, } ss:
City and County of New York, }

George G. Nason, being duly sworn, says: That he is a resident of the city of New York, residing at 237 W. 44th St., and is also a householder therein, and is worth ten thousand dollars over and above all of his just debts and liabilities.

GEORGE G. NASON.

Sworn to, this 2d day of November, 1881, before me,
[SEAL.] J. B. NONES.
Notary Public, Ex O. U. S. Com'r, 91 *Duane St.*

60 SOUTHERN DISTRICT OF NEW YORK, } ss:
City and County of New York, }

Henry G. Atwater, being duly sworn, says: That he is a resident and householder in the city of New York, residing at No. 137 East 116th St., and is worth the sum of five thousand dollars over and above all of his just debts and liabilities.

HENRY G. ATWATER.

Sworn to, this 2d of November, 1881, before me,
[SEAL.] J. B. NONES.
Notary Public, Ex O. U. S. Comm'r, 91 *Duane St., N. Y.*

SOUTHERN DISTRICT OF NEW YORK, } ss:
City & County of New York, }

I certify that on this 2d day of November, 1881, before me personally appeared George G. Nason and Henry G. Atwater, to me known to be the persons described in and who executed the within
61 bond, and severally acknowledged to me that they executed the same.

[SEAL.] J. B. NONES.
Notary Public, Ex O. U. S. Com'r, 91 *Duane St. N. Y.*

Approved Nov. 15, 1881.
SAM'L BLATCHFORD,
Circuit Judge.

We approve of the within bond as to form and sufficiency of sureties.

Dated Nov. 14, 1881.

D. & T. McMAHON,
Proctor's Respondent.

[Endorsed:] U. S. circuit court, S. D. of N. Y. Norman H. Pollock ag'st The Steamboat "Laura" (The Bridgeport Steamboat Company, claimant). (Copy.) Bond on appeal to the Supreme Court. H. G. Atwater proctor for app'l't, 71 Wall St., N. Y. city. Filed Nov. 15, 1981.

62 UNITED STATES OF AMERICA, *ss:*

To The Bridgeport Steamboat Company, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States on the second Monday in October, 1882, pursuant to an appeal from a decree of the circuit court of the United States for the southern district of New York, wherein Norman H. Pollock is appellant and you are respondent, to show cause, if any there be, why the said decree should not be corrected, and speedy justice be done to the parties in that behalf.

Given under my hand at the city of New York, in the southern district of New York, in the second circuit, the 15th day of November, 1881.

SAM'L BLATCHFORD,
Circuit Judge.

(Endorsed): Due service of a copy of the within citation is hereby admitted this 16th day of Nov., 1881. D. McMahon for resp'ts.

63 [Endorsed:] U. S. circuit court, S. D. of N. Y. Norman H. Pollock, libellant and appellant, ag'st The Steamboat "Laura," (The Bridgeport Steamboat Co., claimant), respondent. (Copy.) Citation on appeal to Supreme Court. H. G. Atwater appellant's proctor, 71 Wall St., N. Y. city. Filed Nov. 16, 1881.

64 UNITED STATES OF AMERICA, }
Southern District of New York, } *ss:*

I, Joseph M. Deuel, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to sixty-three, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of Norman H. Pollock, libellant and appellant, against The Steamboat "Laura," The Bridgeport Steamboat Company, claimant and respondent, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 28th day of February,

in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of the United States the one hundred and sixth.

[SEAL.] JOSEPH M. DEUEL, *Clerk.*

Endorsed on cover: S. New York C. C. U. S. No. 191. Norman H. Pollock, appellant, *vs.* The Bridgeport Steamboat Company, claimant of the steamboat Laura, &c. Filed 3rd April, 1882.

114-41

SUPREME COURT OF THE UNITED STATES.

NORMAN H. POLLOCK,
Appellant,

AGAINST

THE BRIDGEPORT STEAMBOAT COMPANY,
Claimant and Respondent.

No. 191.

Brief for Appellant.

Statement of facts.

This appeal is from a decree of the U. S. Circuit Court, for the Southern District of New York, dismissing a libel *in rem*, filled by the appellant against the Steamboat *Laura*.

The action was originally brought in the U. S. District Court for the Southern District of New York to recover certain penalties alleged to have been incurred under the United States Steamboat Inspection Act (U. S. Rev. Stat. Title LII), by taking on board of the Steamboat *Laura* a greater number of passengers than was stated in her certificate of inspection.

The libellant's claim was made under § 4465 of the U. S. Rev. Stat. which provides that:

"*It shall not be lawful to take on board of any steamer a greater number of passengers than is stated in the certificate of inspection; and for every violation of this provision the master or owner shall be liable to any person suing for the same to forfeit the amount of passage money, and ten dollars for each passenger beyond the number allowed.*"

And under § 4469 which provides;

"*The penalties imposed by* § 4465 * * * *shall be a lien upon the vessel in each case*," &c.

The libel alleged that the *Laura* was a steam vessel subject to the provisions of the Steamboat Inspection Act, and had been duly inspected in accordance with the provisions of that Act on or about July 2d, 1879, and a certificate granted to her in which it was

stated she was allowed to carry 142 passengers, and that on May 31st, 1880, she had taken on board at Bridgeport, Conn., and carried to New York City 422 passengers, and on the same day, had taken on board at New York City, and carried to Bridgeport, Conn., 417 passengers, and that each of said passengers paid or became liable for the sum of, at least, 20 cents each as passage money, on account of which the libellant claimed the penalties under the statute amounting to $5,661. The facts alleged in the libel were found as facts by the Circuit Judge and are not in disqute (*Record*, pp. 1 & 25).

The Bridgeport Steamboat Company filed a claim to the vessel, and gave a stipulation for costs (*Record*, p. 5) and for value (*Record*, p. 6), waiving process and seizure (*Record*, p. 7).

The claimant answered (*Record*, p. 7) and set up various dilatory pleas, and also alleged certain facts which it claimed were a defense on the merits (*Record*, p. 10); but on exception taken to this alleged defense (*Record*, p. 10), the exception was sustained by the Court (*Record*, p. 11).

After the suit had been commenced, and after the claimant had answered, the Secretary of the Treasury, acting under an authority which he supposed was conferred on him by § 5294 of the U. S. Revised Statutes, remitted the penalties sued for (*Record*, p. 11), and the claimant, by leave of the Court, put in a supplemental answer, setting up the remission (*Record*, p. 12). The District Court held that the remission granted by the Secretary of the Treasury was a bar to the suit, and dismissed the libel (*Record*, p. 15). The libellant appealed to the Circuit Court, which also dismissed the libel (*Record*, p. 32), and the libellant appealed to this Court. The questions involved here are, whether the action has been brought in the proper form, and whether the remission granted by the Secretary of the Treasury is a bar to the suit.

First Point.

The action is in the proper form and well brought.

The technical defenses raised by the claimant here have been raised and overruled in similar cases by the District Courts for the Southern and Eastern Districts of New York.

The Sea Bird (S. D. of N. Y.), 3 Fed. Rep., 573.
The Laura M. Starin (E. D. of N. Y.), 11 *Id.*, 177.
See also *The Lorellen*, 4 Bissel, 156.

It has been argued that the provision in §4469 that "a bond may, as provided in *other cases*, be given to secure the satisfaction of the judgment" shows that a judgment must first be recovered against the master or owner, and that the judgment there referred to is not the judgment which may be recovered in the suit in admiralty, but that a judgment must first be recovered against the master or owner as a foundation for the suit in admiralty against the vessel.

The meaning of this provision is made clear by reference to a similar provision in the Act of 1852 from the provision in the Act of 1871 (16 Stat. at Large, p. 454, §49), and in § 4469, seems to have been taken. In the Act of 1852 (Stat. at Large, Vol. 10, p. 69, § 10, last clause) the provision is in these words: "*Provided, however, that if any such case a satisfactory bond is given to the Marshal for the benefit of the plaintiff, to secure the satisfaction of such judgment as he may recover, the vessel shall be released.*"

This makes it quite clear that the bond referred to in § 4469 is the ordinary bond to the marshal under § 941 given on a warrant of arrest or other process *in rem*, and that the "other cases" referred to are the ordinary cases in which such bonds are taken.

It may be conjectured that the reason this special provision allowing a bond to be given was thought necessary, was because a bond to the marshal under the act (Act of March 3d, 1847, c. 55; Stat. at Large, vol. 9, p. 181, now revised in § 941 of U. S. Rev. Stat.) could not be given in cases of seizure for forfeiture under any law of the United States, and it was therefore supposed that such bond to the marshal could not be given in cases of this description unless there was a special provision of law authorizing it. This conjecture is strengthened by the fact that it has been held in some circuits that proceedings in admiralty to enforce penalties given by the act for the regulation of steam vessels must be commenced by seizure.

The Tugboat May, 5 Bissell, 449.
The Tugboat Oconto, 5 Bissell, 460.

In the Second Circuit, however, these cases have not been followed; and it is there held that a seizure is not necessary.

The Joshua D. Levinese, 9 Benedict, 339.

In this suit a seizure was expressly waived (*Record*, p. 7).

If this view of the matter be taken, the meaning of the words "as in other cases" is plain. It means, as in other cases

where by statute a bond to the marshal for the release of the vessel may be given.

The exceptions to the libel in paragraph (m) of the claimant's answer (Record, p. 9) are on the ground that the penalties imposed are excessive, and that the statute (Rev. Stat. § 4465) is therefore in contravention of the prohibition of the Constitution (Amend. VIII.), against the imposition of excessive fines, and that under the provisions of the Constitution (Art. III., §2, Subd. 3, and the 5th, 6th and 7th Amendments) the claimants are entitled to a trial by jury, and therefore a suit *in rem* cannot be sustained.

As to the penalty being excessive, it is not more severe than many others on the statute-book, and is not out of proportion to the offense. Ten dollars is not an excessive penalty to pay for endangering a human life.

As to the right of trial by jury, it has long been settled that Congress may create a cause of action of this sort and give a remedy *in rem* to enforce it.

Union Ins. Co. vs. *U. S.*, 6 Wall., 759, 764.
The Queen, 4 Ben., 242; S. C. on Appeal, 11 Blatchf., 416.

The seventh amendment, which provides that "in suits at common law * * * the right of trial by jury shall be preserved," did not prevent Congress from creating causes of action enforceable in admiralty as it had theretofore done. The seventh amendment was ratified December 15th, 1791, and in 1789 Congress in the Customs Act had provided for the forfeiture of vessels—an admiralty proceeding (see Act of July 31st, 1789, Stat. at Large, Vol. I, p. 49, Ch. 5, § 12), and Congress, after the passage of the amendment, had the power to create other maritime torts which should be remediable in admiralty. A similar provision in the Constitution of the State of New York was so construed in *Sheppard vs. Steele*, 43 N. Y., 52.

Second Point.

The warrant of remission granted by the Secretary of the Treasury is void, and of no effect, because the statute which assumes to give him power to grant it is unconstitutional and void.

The statute (R. S., §5294) is unconstitutional, because it infringes on the pardoning power, which by the Constitution is vested *exclusively* in the President. The Constitution, by article II., § 2, gives the President power "to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."

The power to grant "pardons for offenses against the United States" includes the power to relieve from the punishment which, by any statute of the United States, is attached to the commission of any act. It includes, therefore, the power to remit fines and penalties, as has been frequently decided by the U. S. Courts; and under the advice of the Law Department of the Government, the President has constantly exercised this power.

Story on the Const., § 1504.
U. S. vs. Lancaster 4 Wash. C. C., 66.
U. S. vs. Harris 1 Abb. U. S., 110.
U. S. vs. Wilson 7 Pet., 161.
Exp. Wells, 18 How., 307.
3 Opinions Attorney General, 418.
4 *Id.*, 573.
6 *Id.*, 393, 488.
16 *Id.*, 1.

The pardoning power is vested *exclusively* in the President, and it is for him to grant or withhold a pardon. The theory of the Constitution is, that there shall be three departments of the Government—the Executive, the Legislative and the Judicial—and that these three shall be separate and distinct; and the Constitution has accordingly enumerated the powers that each one shall possess and exercise; and when certain powers are conferred on one branch of the government and are not conferred on any other branch, the branch of government upon which they are conferred possesses them exclusively.

The power of the President to pardon being exclusive, cannot be conferred on any one else, nor can any one exercise any part of it without infringing on the power of the President. The power to pardon implies the power to act on all applications for pardon, and to refuse or grant them. If any one besides the President can grant a pardon without the President's concurrence, then the President has not the control of the matter, for pardons may then be granted which the President would refuse, and on the applications for which his discretion does not act. If Congress can confer power on the

Secretary of the Treasury to grant pardons, then it can itself grant pardons, and can say under what terms and conditions they shall be granted. And if it can authorize the Secretary of the Treasury to remit penalties incurred under the act for the regulation of steam vessels, it can authorize him or any one else to remit the punishment of any offense whatever. For example, it might authorize the Secretary of War to issue pardons for treason, or for all offenses generally, the result of which would be that the President's power to decide whether a pardon should or should not be granted would be gone, for, after he had refused to grant a pardon, it could still be granted under the authority conferred by Congress.

The principle above stated, viz., that laws which infringe the pardoning power of the Executive are void, has been frequently recognized and enforced by this Court (*Exp. Garland*, 4 Wall., 333; *U. S. vs. Klein*, 13 Wall., 128).

The Supreme Court of Georgia has applied this doctrine very pointedly. By the Constitution of the State of Georgia the Governor is given power to "commute penalties," and under this it was held that an Act of the Legislature giving the Board of County Commissioners of a certain county power "to hire out" within the limits of the State, and under terms and restrictions to be determined by the Commissioners "persons convicted of misdemeanor, and sentenced to work in the chain gang on the public roads or public works. * * * * * * or where said persons are confined in the common jail of said county for non-payment of fines imposed for such misdemeanor" was unconstitutional, because it empowered the Commissioners to change or commute the sentence of the Court.

Ogletree vs. Dozier, 59 Ga., 800.

So, where the Legislature of Alabama passed an Act providing for the payment to the sureties of the Clerk of the Circuit Court of Marion County, in that State, the amount of a fine which they had paid for the Clerk, in consequence of his having committed a breach of his duty, the Supreme Court of Alabama held that this was virtually an exercise of the pardoning power, and that as the Constitution of Alabama confered on the Governor the power to remit fines and forfeitures, the act was unconstitutional and void.

Haley vs. Clark, 26 Ala., 439.

So, too, where the organic act of the Territory of Dakota had given the Governor the pardoning power without restrictions, At-

torney-General Devens gave it as his opinion that statutes passed by the Territorial Legislature, providing for the mode in which applications for pardons should be made, and requiring the Governor to file all papers presented him on such applications, were an infringement on the Governor's power, and void as a violation of the organic act.

16 Op. Atty. Gen., 27.

There are but two ways of avoiding the result of the authorities cited above. One way is to say that in this case there was no "pardon." The other way is to say that the offense was not an "offense against the United States."

Judge Choate took the former view and argued (*Record*, p. 19) that whatever power of remission in the Secretary Congress chooses to annex as a condition to the grant of the penalties given, is not a power to pardon, but is simply a restriction, limitation or condition annexed to the grant of the penalty.

He cites, to support this position, *U. S. vs. Lancaster* (4 Wash. C. C., 67). An *obiter dictum* is there found to the effect that as Congress can impose penalties it can also provide how they shall be remitted, and as supposed authority for this position there is cited the maxim, *cujus est dare ejus est disponere.*

But what is the origin and meaning of this maxim and can it have any application to such a case as this? In Broom's Legal Maxims (p. 459) it is classified as a maxim relating to the transfer of property and it is translated, "The bestower of a gift has a right to regulate its disposal."

The maxim is said to set forth the principle on which the old feudal system of feoffment depended, *tenor est qui legem dat feudo.* Another form of the maxim is *modus legem dat donationi* (the bargainor of an estate may, since the land moves from him, annex such conditions as he pleases to the estate bargained, provided they are not illegal, repugnant or impossible).

This maxim, then, is one applied to conveyances of real estate in the feudal period, and can furnish no guide to interpret the Constitution of the United States. Attempt to extend the maxim to other branches of the subject and this becomes at once apparent.

The grantor might make a defeasible conveyance, as if he should make a conveyance, reserving to himself a right of re-entry in case his grantee should convey. If for condition broken his right of re-entry accrued, he might waive it and pardon the breach.

But could Congress pass an act remitting a penalty? Certainly

not (*State vs. Nichols*, 26 Ark., 74; *State vs. Sloss*, 25 Misso., 291). If this principle were allowed, Congress could attach such a condition to every penalty or punishment and leave no crime which could not be pardoned without the concurrence of the President.

It may be true that Congress, like other grantors, may make a grant and attach conditions to it. Thus, it may grant public lands to a railway company on condition that within a certain number of years it construct a line of railroad through them, and to such a grant by Congress the maxim *cujus est dare ejus est disponere* would be applicable. But that is a very different case from this. Here is no grant; no property is disposed of, and there can be no conditions attached to the grant. Congress has not taken the property of the Bridgeport Steamboat Company and bestowed it on the libellant. Congress has declared the punishment of an offense in regard to which it had power to legislate. There its power ended. The Constitution has declared how the penalty incurred can be remitted.

Whatever may be the form or pretended aim of an Act of Congress, its constitutionality must be judged by its *real* purpose and actual effect, and no ingenuity can so disguise an illegal purpose that the Courts will not detect it. The Courts have been astute in detecting the real meaning of legislative acts and condemning them as unconstitutional, when they really were so, without regard to the form or shape in which they were framed. In addition to the instances cited above in regard to the pardoning power, many instances may be collected in regard to other sorts of legislation. Thus, this Court has held that State laws, nominally mere health or police laws, were unconstitutional because in their effect they amounted to a regulation of commerce, and therefore were an exercise of power vested exclusively in the Federal Government.

The Passenger Cases, 7 How., 283.
Henderson vs. The Mayor, &c., 92 U. S., 259.
Chy Lung vs. Freeman, *Id.*, 275.

No argument can be drawn from the practice of the British Government and the powers exercised in England by Parliament. There the Parliament is supreme. Here the Constitution is supreme, and in a country governed by a written Constitution the precedents of British history, although most useful in determining the meaning of words used in the constitution are of little or no value in determining what powers belong to the legislative department.

Kilbourn vs. Thompson, 103 U. S., 168.

In fact, the attempt to draw analogies between the British Parliament and Congress has often led to erroneous conclusions as to the power of Congress, as shown in the case last cited.

The system of allowing penalties to be remitted by the Secretary of the Treasury was first adopted in regard to penalties incurred under the customs duties acts, and was borrowed from the English practice, and was, no doubt, founded on a supposed analogy between Parliament and Congress. That such a system has long prevailed does not add to the argument in favor of it. It has not prevailed any longer than the idea that the order of the House of Representatives and the warrant of the Speaker imprisoning a person for contempt in refusing to answer questions as a witness before the House, was a complete answer to an action for false imprisonment, yet this idea has been totally exploded by the decision in Kilbourn vs. Thompson, above quoted.

The power of the Secretary to remit in a case where the Government is the plaintiff is different from his power to remit in this case, because there it may be claimed that he is acting only as the agent of the Government in discontinuing the suit, and that Congress may dispose of the moneys due the United States for the penalty as it may of other moneys of the United States; but in this case no such contention can be made, for the United States is not the plaintiff in the suit, nor entitled to any part of the recovery.

Judge Blatchford relied on the second ground above stated and inclined to the view that whatever offence may have been committed, was not an offence against the United States. (*Record*, p. 30).

But whether or not the offence was an offence against the United States within the clause of the constitution giving the President power to pardon, must be determined by discovering whether the King of England, at the time of our separation from that country, could by virtue of his pardoning power remit the penalty for such an offense. This Court has repeatedly decided that such is the test.

U. S. vs. Wilson, 7 Peters, 150.
Exp. Wells, 18 How., 307, 310, 311.
Exp. Garland, 4 Wall, 333, 380.

The question then is: Could the King of England at the time of the Revolution, remit the penalty for an offense where the penalty was recoverable by any one who would sue therefor?

It was well settled that he could, provided the pardon was granted before suit commenced.

Hawkins' Pleas of the Crown, vol. 4; Title Pardon, Ch. 37, § 33.
Chitty's Prerogatives of the Crown, p. 91.
3 Coke's Inst., 238.

The President, therefore, had power to remit the penalty for the over carrying alleged in the libel (at least before suit brought), and the offense of overcarrying was therefore an offense against the United States, within the meaning of the clause of the constitution conferring the pardoning power. The character of the offense was fixed and determined at the time it was committed. Its nature and character could not change afterwards. It continued to be an offense against the United States after suit brought as well as before, although it was then too late for the President to exercise his pardoning power.

The case of *U. S. vs. Morris* (10 Wheat., 246) is not decisive of this case, or even an authority in point. It was there decided that the Secretary of the Treasury had authority under the remission act of March 3d, 1797, to remit a forfeiture or penalty accruing under the revenue laws at any time before or after a final sentence of condemnation or judgment for the penalty, until the money was actually paid over to the collector for distribution, and that the shares of the customs officers were subject to the remission.

An examination of the case will show that the judgment proceeded on the ground that until it was paid over to the collector the customs officers had no interest in it.

The action in that case had been brought under the Collection Act of 1799, c. 128, which provided, § 90, "that all penalties accruing by any breach of this act shall be sued for and recovered, with costs of suit, in the name of the United States, * * * and the collector, within whose district the seizure may have been made, or forfeiture incurred, is * * * authorized to receive from the Court within which such trial is had, or from the proper officer thereof, the sum or sums so recovered, after deducting proper charges to be allowed by the said Court; and on receipt thereof, the said collector shall pay and distribute the same, without delay, according to law," and by § 91, "that all fines, penalties and forfeitures, recovered by virtue of this act, and not otherwise appropriated, shall, after deducting all proper costs and charges, be disposed of as follows: One

moiety shall be for the use of the United States, and be paid into the treasury thereof, by the collector receiving the same; the other moiety shall be divided between, and paid in equal proportions, to the collector and naval officer," &c.

It will be noticed that the act did not give a share to any one in the penalty or forfeiture, but only provided that the fines, &c., "*recovered*" should be disposed of in a certain way; and this Court held that until the money was paid over to the collector the fine was not "recovered," and no right to it attached.

The question as to the constitutional power of Congress to pass an act giving the Secretary of the Treasury power to remit penalties was not discussed or decided.

Third Point.

Even if § 5294 is constitutional, it does not give the Secretary of the Treasury power to grant the remission he has issued in this case, because that statute does not give him power to remit a penalty after a suit by a private person has been brought to recover it.

In considering the construction of § 5294, there are two main questions that arise, and these are:

(*a*) Does the power to "*remit or mitigate any fine or penalty provided for in laws relating to steam vessels*" include the power to remit when the United States is not interested, and where a popular action has been brought; and

(*b*) In case those words, standing by themselves, do include such power to remit, is their meaning restricted by the subsequent words of the section, which provide that the Secretary may "*discontinue any prosecution to recover penalties denounced in such laws, excepting the penalty of imprisonment, or of removal from office, upon such terms as he, in his discretion, shall think proper, and all rights granted to informers by such laws shall be held subject to the Secretary's power of remission, except in cases where the claims of any informer to the share of any penalty shall have been determined by a Court of competent jurisdiction, prior to the application for the remission of the penalty.*"

(*a*) The power to "*remit or mitigate any fine or penalty*" must be construed with reference to the established meaning of those words

as used in constitutions and legislative acts. The power to remit fines and penalties is only a part of the power to "grant pardons," and on the principle that a part cannot be greater than the whole, what cannot be done under a power to "grant pardons" cannot be done under a power to "remit penalties."

But the test of what can be done under a power to "grant pardons" (as the words are used in the Constitution of the United States, and of the various States of the Union) is—what could the King of England do by virtue of his pardoning power at the time of our separation from that country.

Pomeroy's Const. Law, § 684, pp. 456–459.
U. S. vs. Wilson, 8 Peters, 160.
Exp. Wells, 18 How. (U. S.), 307, 310, 311.
Exp. Garland, 4 Wall., 333, 380.

Now it was well settled in England at the time of the American Revolution that the king could not grant a pardon to the injury of a subject, and consequently that in a popular suit he could not remit the penalty after suit brought.

Coke, 3 Inst., pp. 236, 237, 238.
Cro. Jac., 159.
Banning vs. Fryer.
Howel vs. James, 2 Str., 1272.
Comyn's Digest, Title, Pardon (F).
7 Bacon's Abridgement, 407.
17 Viner's Abridgement, 39.
1 Chitty's Criminal Law, 742, 762, 764.
Hawkins' Pleas of the Crown.
Title Pardon, ch. 37 §§ 33–34.
Chitty's Prerogatives of the Crown, pp. 90, 91.
Foster's Case, 11 Coke, 65, 66.

And this principle has been adopted and acted on in this country.

4 Opp. Att. Gen., 576.
5 *Id.*, 542.
6 *Id.*, 403, 490.
U. S. vs. Lancaster, 4 Wash., 66.
U. S. vs. Harris, 1 Abb. U. S., 110.
Shoop vs. Commonwealth, 3 Pa. St., 126.
Rowe vs. State, 2 Bay (S. C.), 565.
State vs. Williams, 1 Nott & McCord (S. C.), 26.
Matter of Flournoy, 1 Ga., 606.
State vs. Farley, 8 Blackf. (Ind.), 230.
State vs. McO'Blenis, 21 Mo., 272, 276.
Exp. McDonald, 2 Whart. (Pa.), 440.

The President then under his power to "grant pardons" could not remit the penalty in this case after suit brought, and consequently the Secretary, under his power to "remit penalties," cannot do so.

(*b*) Conceding for the sake of the argument that the grant of the power to remit fines and penalties, if unqualified by any other words, would give the Secretary power to remit in the present case, yet a consideration of the whole of § 5294 shows that the Secretary's power is intended to be restricted, when suit has been brought, to those cases in which the suit has been brought by the United States and under the control of the officers of the Government.

The intent of § 5294 is to limit the power of the Secretary to cases where the king could, or the President may, pardon, except in those cases where the statute has expressly given him a greater power, and those cases are only those in which the suit is brought by the United States.

(1) The provision that the Secretary may remit any fine or penalty is immediately followed by one in the alternative, that he may "discontinue any prosecution to recover penalties denounced in such laws." This shows that the fines and penalties first referred to are those to recover which no suit has been begun, and that two classes of penalties are intended to be treated of, viz.: penalties not sued for and penalties sued for. Over penalties not sued for the Secretary has unqualified power; over penalties sued for he has only such power as he can exercise by his control over the suit by discontinuing it.

(2) The use of the active verb "discontinue" shows that the statute contemplates such action only in cases where the Secretary can control the record, the United States or its officers being plaintiffs or prosecutors. If it were the intention of the act to authorize the Secretary to discontinue suits begun by private citizens, it would have used some such words as "enjoin the further prosecution," &c. The word "discontinue" refers to an act by the plaintiff in the suit.

(3) The fact that in a single instance—*i. e.*, that of an informer's share—the Secretary is expressly given a greater power than that of the President, furnishes a very cogent argument that, in other instances not expressly provided for, the Secretary's power is no greater than that of the President.

(4) If the general power conferred was that of remitting all penalties, even those given to a citizen, and that, too, after suit brought,

there was no necessity of inserting the express provision that informer's shares should be subject to remission. It is a rule of construction that effect must be given to every provision of the act.

(5) The libellant in this suit does not come within the designation in the statute of "informers," whose rights are declared to be subject to the Secretary's power of remission, except in cases where their claims to the share of any penalty shall have been determined by a Court of competent jurisdiction prior to the application for the remission of the penalty. The term "informer" properly applies only to one who proceeds by information in the name of the king or State. In cases where the suit is brought by the United States, it is by information or libel of information, and the person who furnishes to the District Attorney the facts on which the suit is brought is termed the "informer."

The informer referred to by § 5294 is the informer to whom rights are given by "*such laws*"—*i. e.*, laws relating to steam vessels.

By sections 4499 and 4500, penalties are given, "one-half to the "use of the informer." The latter section provides that the penalty for all violations, "not otherwise specially provided for, shall be "a fine of five hundred dollars, one-half to the use of the in-"former." These sections show what is meant by the word informer in § 5294.

The exception which follows of an informer, whose claims to the share of a penalty shall have been determined by a Court, &c., also shows what kind of an informer is meant. The libellant in this case is not an informer, and does not sue for a share. The words, "the claims of any informer to the share of any penalty shall have been determined by any Court of competent jurisdiction," refer to claims not against the party liable for the penalty, but against a fund recovered in a suit brought by the United States.

Judge Choate has argued at some length (*Record*, p. 21) to prove that the plaintiff on a penal action comes within the meaning of the term "informer." He has certainly shown that the term "informer" may be and often is used in such a sense as to include the plaintiff in a penal action. It was never intended to deny this fact. What was and is contended is that there is a well-known and intelligible distinction between an "informer" and a "plaintiff on a penal statute." That the term "informer," when accurately used, has a more restricted meaning and does not include the "plaintiff on a

penal statute." That the term "informer" is used in this restricted meaning in § 5294, as is shown by the context, and that effect should be given to it accordingly.

The terms "informer" and "information" have the same origin, and are derived from the language used in proceedings by information which were always proceedings in which the king was interested. "An information is a declaration of the charge or offense against any one at the suit of the king."

Terms de Ley, Information.
Comyn's Digest, Information (A 1).

The entry of an information by the Attorney-General in the King's Bench was, "*Memorundum quod* T. T. *miles attornatus domini regis nunc generalis. qui pro eodem domino rege in hac parte sequitur in propria persona sua, venit hic in curiam dicti domini regis coram ipso rege apud Westmonasterium die S. proximo post,* &c. *Et pro eodem rege dat curiam hic intelligi et informari quod,* &c.

Comyn's Digest, Tit. Information, A 1.

When the information was not at the instance of the Attorney General, but of a private person who claimed a *part* of the penalty, the form was substantially the same, except that instead of the words "*pro eodem domino rege*" the form read "*qui tam pro rege domino quam pro se ipso.*" The person giving the information to the Court—*qui dat curiam * * informari*—was the informer. In every information there was an informer, whether he had any share in the recovery or not. An informer, therefore, need not be either a party to the suit or interested in the recovery.

A "plaintiff on a penal statute," on the other hand, has an equally plain and distinct meaning. It is a person who, in his own name, sues to recover a penalty given by statute to him, either for his own benefit or in trust for some one else.

The distinction between these two classes of persons is recognized by the United States Statues, as in Rev. Stat. § 975, which provides that "If any informer or plaintiff on a penal statute," is defeated in his suit, the defendant (except in certain special cases) shall be entitled to costs.

If the term "informers" in § 5294 is construed according to this more restricted meaning, the whole section is consistent and intelligible, but the term "informer" cannot be applied to the libellant here without torturing the meaning of other words. It is both

illogical and absurd to speak of a claim to the whole of a penalty as a claim to a share of it. When one has the whole of a thing he does not "share" with any one. There is no "sharing" and no "share."

The decree of the Circuit Court should be reversed and a decree ordered for the libellant for the amount of the penalty claimed.

New York, January 2d, 1885.

HENRY G. ATWATER,
Counsel for Appellant.

114-41

Supreme Court of the United States,

ON APPEAL FROM THE UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK—SECOND CIRCUIT.

NORMAN H. POLLOCK,
Libellant and Appellant,

against

THE STEAMBOAT "LAURA" (THE BRIDGEPORT STEAMBOAT CO.),
Claimant and Appellee.

Points of Claimant and Appellee.

Statement.

The Steamboat Laura, owned by the Bridgeport Steamboat Co., and plying between Bridgeport, in the State of Connecticut, and New York, carrying freight and passengers, was, on 6th of October, 1880, arrested under a monition issued on a libel filed in the United States District Court within and for the Southern District of New York. The libellant claimed to recover five thousand six hundred and sixty-one dollars, being alleged penalties for carrying an excess of passengers beyond the amount stated in her certificate of inspection; such excess of passengers, it being alleged, was carried on the morning

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trip down from Bridgeport to New York, on Decoration day, 1880, and also on the evening trip up from New York to Bridgeport; the actions were founded on Sections 4,465 and 4,469 of the Revised Statutes of the United States. The libellant in this case was one Norman H. Pollock, who was not an officer of the Government, or charged with any public duty of attacking steamboat men who violated the law, but was a private individual who, for gain, instituted and conducted, through his own private counsel, this prosecution. The Bridgeport Steamboat Company claimed and intervened and bonded the Laura. They put in an answer (see Transcript, pages 7 to 10, inclusive). In this answer they set up three distinct lines of defenses. First line of defense (folios 13 to 16) consisted of a series of exceptions, attacking the right of the libellant to institute any such suit, or to have any such recovery. Second line of defense was—that under the provision of the Revised Statutes of the United States, the defense were not called upon to answer allegations of the libellant tending to subject them to a penalty. Third defense was—that on the day in question, May 31st, 1880, the Laura had on board life preservers and life-saving apparatus suitable for the number of passengers carried, and that before the day in question they had received, from United States Steamboat Inspectors, special permission to carry five hundred passengers; that by accident, neglect, or omission, the Collector of Bridgeport omitted to indorse on the face of the certificate they had such permission to carry such extra number and were therefore, if guilty of any acts authorizing a penalty, they were only guilty of a penalty (4499 and 4500), with which penalty the libellant had no right to intermeddle. To this answer the libellant filed exceptions—to the second defense, in substance, that the claimants could not refuse to answer—and to the third defense,

that the verbal permission given by the Steamboat Inspector to carry the five hundred passengers was invalid. These exceptions were argued before Judge Choate (page 11 of Transcript).

The learned Judge overruled their first exception and sustained their second one, which in effect overruled the third defense of claimant's answer (fol. 19). Now, whilst this was going on between the respective counsel, the Bridgeport Steamboat Company filed a petition with the Secretary of the Treasury, under Section 5,294 for a remission of these penalties. Upon that petition, the Secretary of the Treasury referred the matter for investigation to the District Attorney of the Southern District of New York, (fol. 21), and thereupon before said District Attorney both parties were in effect heard on such remission (fol. 21). The District Attorney gave his opinion to the Treasury Department that the case was one in which, in his judgment, a remission should be granted, but on payment of the libellant's costs (fols. 21-22). The Secretary of the Treasury finally granted the remission of the penalty sued for in this suit on said terms. The warrant of remission appears on pages 11 and 12 of the transcript. Upon filing that remission in the clerk's office the claimant's counsel made a motion to permanently stay the libellant's proceedings, on payment of his costs. The matter was fully argued by respective counsel before his Honor, Judge Choate, who delivered the able and exhaustive opinion appearing in Transcript (fols. 30 to 42). The learned Judge fully sustained the remission, but ordered the claimants to set it up by way of supplemental answer, and thereupon the claimants filed their supplemental answer holding to their previous answer and setting up the remission (see same, fols. 21 and 22 of the transcript). To this supplemental

answer, the libellants filed exceptions (see same on page 14 of the Transcript). These exceptions were heard before his Honor, Judge Choate, who overruled the exceptions (see decision, page 14 of Transcript). The case finally came on for trial before his Honor, D. Judge Choate, on 4th of January, 1881; upon the warrant of remission being produced and it being admitted that the libellant's costs had been taxed and paid into Court, the learned judge below dismissed the libel (see minutes of trial below, pages 14 and 15 of Transcript). From such decree libellant took his appeal to the Circuit Court and both parties took testimony, which was submitted to said Circuit Court, Blatchford J., who made the decree appealed from, finding the facts pages 25 and 26 of Transcript, and arriving at the conclusion of law that the libellant's libel should be dismissed *because of the remission by the Secretary of the Treasury:* we shall, on this appeal, present this case from two points of view: 1st, that the remission of the penalties granted by the Secretary of Treasury is valid and amounted to a bar to the libellant's claim. 2d, that were there no remissions, the libellant had no claim under the law and facts of the case.

POINTS.

I.—Section 5,294 of the U. S. Rev. Statutes invests the Secretary of the Treasury with absolute power of remission of the penalties sued for in the Court below, upon such terms, however, as he in his discretion should think proper. In the present case he imposed the payment of the costs of the suit, which the claimants caused to be taxed and tendered to the libellant and finally paid into Court.

Section 5,294 further provides "that all rights

granted to informers by such laws shall be held subject to the Secretary's power of remission."

The penalties to be remitted were those provided for in laws relating to steam vessels.

The penalties in this case remitted are those denounced in Section 4,465 of Chapter 2, Title 52, U. S. Rev. Statutes, entitled "Regulation of steam vessels."

Upon looking at the original Act of Congress, it will be seen that Sections 4,465 and 5,294 are parts of an original statute.

> Laws of 1871, Chap. 100, Vol. 16, Secs. 48 and 64.

The revision, by splitting those sections into different titles, does not destroy the legal effect of the right to the penalty and of the right of remission of the penalty which were parts of the original statute; so that whatever right Mr. Pollock acquired by the discovery and action under Section 4,465 was subjected to the condition in the Treasury Department to remit his rights in case the Secretary of the Treasury saw fit to remit.

II.—The argument presented by the libellant and appellant in each of the Courts below was that the pardoning power was solely vested in the President, and that Congress had no right to vest such power in the Secretary of the Treasury.

Even if they had—that the right of the informer had become vested, and would not be discharged by the remission of the Secretary of the Treasury.

The learned Judge of the District Court in his opinion given in that Court in this case below, on the motion for a stay, see same in the transcript of the Record, pages 18 to 25;

And the opinion of the learned Justice (BLATCHFORD, J.), on the appeal in the Circuit Court, have so exhaustively treated the points in question, that we deem it a work of supererogation to add any more views on the subject, yet we will add a few suggestions.

(1.) By the Constitution of the United States, Art. 1, Sec. 8, Subdivision 3, Congress has power to regulate commerce with foreign nations and among the several States, &c. Sub-section 18. To *make all laws* which shall be *necessary and proper* for carrying into execution the foregoing powers—and all other powers vested by this Constitution in the Government of the United States *or in any department or officer thereof.* The steamboat Laura was engaged in commerce between the States of Connecticut and New York—carrying freight and passengers between the two States in question on an arm of the ocean, the Long Island Sound, and its confluents, the East River and the waters of the Port of New York.

The regulations embodied in Sections 4,465, 4,469 and 5,294 were clearly within the grant of commercial power to Congress.

They were conducive to the end sought to be achieved.

U. S. *v.* Fisher, 2 Cranch., 358, 396.
McCulloh *v.* Maryland, 4 Wheat., 316, 419.

(2.) The grant of the pardoning power to the President, Article 2, Section 2, is in these words:

> "And he shall have power to grant reprieves and pardons for *offenses* against the United States, except in cases of impeachment."

By examining the provisions of 4,465 and 4,469 it will be found that the right acquired by the informer (the present appellant), if he acquired any is only a right to *sue in a civil court* for a penalty, and to call upon the master or owner for a bond by enforcing a lien against the vessel.

U. S. *v.* Simms, 1 Cranch., 252.

Nowhere in the act or set of acts affecting this particular class of penalties or this particular case, or in any part of the United States Statutes, are such acts declared to be "*an offence* against the United States" or if, by reason of its being "malum prohibitum" it may be *construed to be an offence* against the United States, yet by reason of the civil remedies of action and "lien" solely afforded therefor, the acts denounced are not what would be called "*crimes* against the United States" within the purview of that grant of the pardoning power to the President.

See 11. Opin Atty. Gen'l., 122. The Minnesota.
Hitchcock *v.* Menenger, 15 N. H., p. 97.

Such being the case, the Congress of the United States, under Art. 1, sec. 8, had ample right to legislate on the subject matter involved in the case.

That Congress had power to regulate the navigation of steam vessels, to prescribe the number of passengers that such steamboats should carry, and to impose checks on the cupidity of masters and owners of such crafts for the protection of the travelling public by imposing penalties for their carrying an excess of passengers, cannot be doubted.

3. We maintain also, that the provision imposing penalties in such cases can be enlarged, restricted, mollified, assuaged, or discharged by further or

concurrent provisions relieving careless, heedless or improvident masters or owners of vessels, otherwise innocent, from the strict consequences of their acts.

The right given to the informer to acquire such a penalty is coupled with the condition that it is subject to a right of remission in *proper cases*. The Judge of the case in which to exercise the right of remission is properly vested in a high officer of the Government, which discretion is only fettered by the limitation that it must be exercised before *Judgment* on the Informer's claim. In no sense does this legislation infringe upon the pardoning power vested in the President.

Conner *v.* Bent, 1 Mo., 235.

As the learned Justice below in his opinion says:

"A power in the Secretary to remit penalties and forfeitures has existed by statute since 1790, and has never been regarded as invalid because of the existence of the power in the President to remit by pardon the same penalties and forfeitures."

4. There are many and valid reasons why such a right to remit should exist under such an ironclad statute like the present *pari passu* with the declaration of the penalty and with its gift to any one who may sue.

In other words, if the libellant's and appellant's doctrine be correct, an individual or corporation may innocently or carelessly subject itself to a set of penalties which Congress may donate to an informer who sues. This informer may be, as in this case, a total stranger to the act denounced. The set of penalties for the acts inhibited may amount to a confiscation, *as in this case*, of the vessel, yet the libellant says Congress have not the power to impose a limitation or condition to the imposition of the extraordinary penalty they have imposed.

Such an argument flies in the face of other constitutional provisions, viz.: Amendments, Article 8, forbidding the imposition of excessive fines. There is no reason why the legislative branch of government should donate an offender's property to a total stranger to the acts denounced, without at the same time putting an emollient provision limiting the destructive effect of their legislation.

No legislative act should be so construed as to fine a party $5,661 for making two trips with its steamboat on the same day on a short route of 50 miles with a load of passengers in excess of their capacity as measured by their inspector's certificate and donate that fine to an informer who sues therefor, rejecting the limitation of that fine in a proper case by a high officer of the government—*in a case which the legislature does not denounce as a crime.*

No such construction, therefore, should be given to the grant of the pardoning power to the President as was contended by the libellant below, especially where it is contended and with force, that a power to pardon in the Executive does not endow the latter *with the power to remit the penalty so far as the informer is concerned.*

5. The right of the Secretary to remit has come up in such various ways and forms in the conduct of our national affairs during the past 90 years as that a very strong argument "ab inconvenienti" might be presented against overturning it—Thus—

(*a.*) In the Margaretta, 2 Gall., 515, it was held that the Secretary of the Treasury had no power to remit penalties unless in cases provided for by law.

(*b.*) In the Minnesota, 11 Opin. Atty. Gen., 192, the learned Attorney General (Bates) held that the grant of power in the constitution to the Presi-

dent to pardon "offenses" against the United States is in its terms and in its obvious sense limited to offenses—to crimes and misdemeanors against the United States, and does not embrace any case of forfeiture, loss or condemnation not imposed by law as a punishment for an offense. There is nothing in the constitution which confers on the President the power of remission of penalties and forfeitures where a party has not been proceeded against personally and criminally for any offense or crime against the United States, but where his vessel was seized and proceeded against the President has no constitutional or statutory authority to exercise any power of remission. In 10th Opinions p. 452, the same Attorney General had given an opinion to same effect.

(*c.*) In Smith case, 10 Opn. Atty. Genl., p. 1, it was held (Bates, Attorney General), that the President's remission of a penalty has no effect.

(*d.*) In U. S. *v.* Morris, 10 Wheat., 246, affg. 1 Paine, 208, it was held that the power of the Secretary of the Treasury to remit in certain cases may be exercised at anytime until the amount is actually paid over to the collector for distribution.

This case, which seems to be decisive on this question, has been cited and approved of in the following cases, viz.:

McLane *v.* U. S., 6 Peters, 404, Opin. 426.
State of Maryland *v.* B. & O. R. R. Co., 3 How., 534, Opn. 552.
The Piqua Branch *v.* State Bk., 16 How., 408.
Dorsheimer *v.* The U. S., 7 Wall., 166, 174.
7 Wall, 461, 462.

(*e.*) The power of the Secretary to remit was applied in

Jungbtreth *v.* Redfield, 4 Blatch., 219.
Gallego *v.* U. S., 1 Brock., 439.
U. S. *v.* Lancaster, 4 Washn., 64.
U. S. *v.* Harris, 1 Abb. U. S. R., 110.
Murray *v.* Arthur, 13 Blatch., 429.
The Palo Alto Daveiss, 343.

(*f.*) In U. S. *v.* Barrows, 3 Pittsburgh, Pa., 151, it was held that a regulation of the Treasury Department made in pursuance of an Act of Congress becomes part of the law and is as such binding.

6. On the other hand the pardoning power of the President has been construed in the following cases, viz.:

U. S. *v.* Thomason, 4 Bissell, 336.
Osborn *v.* The U. S., 91 U. S., 474.
U. S. *v.* Tebton, 7 Ben., 306.
Knox *v.* The U. S., 95 U. S., 149.
Re Weimer, 7 Reporter, p. 38.

III.—But if this learned Court should hold that the learned Court below was in error in dismissing the libellant's cause because of the warrant of remission, we desire to present a few points showing that the libellant never had any standing in Court or right to recover the alleged penalties in question.

The points that we wish to make upon that question are set forth in our answer in the Court below, Folios 13 to 16 of Transcript, and were argued by us in the District and Circuit Courts below, in opposition to the libellant's action, and we maintain we have the same right to argue them

here; and upon these exceptions thus urged and contained in that answer we make the following points:

I.—This suit is brought on the Admiralty side of this Court by the libellant, a stranger to the act denounced, to recover the penalties provided for by Sec. 4,465 of the U. S. Revised Statutes, which reads as follows:

"Sec. 4,465. It shall not be lawful to take on board of any steamer a greater number of passengers than is stated in the certificate of inspection; and for every violation of this provision the master or owner shall be liable, to any person suing for the same, to forfeit the amount of passage money and ten dollars for each passenger beyond the number allowed."

Upon a reading of this section, if it stood alone, it would seem obvious that the penalties can be recovered only by action against "the master or owner," who would of course be entitled to have their liability to the penalty and its extent ascertained by the verdict of a jury.

But the libellant contends that the present cause of action is made a subject of admiralty jurisdiction by virtue of the provisions of Sec. 4,469, United States Revised Statutes, which reads as follows: "Sec. 4,469. The penalties imposed by sections forty-four hundred and sixty-five and forty-four hundred and sixty-eight shall be a lien upon the vessel in each case; but a bond may, as provided in other cases, be given to secure the satisfaction of the judgment."

In support of libellant's position he cites the cases of United States *v.* The Missouri (9 Blatch., 433), and United States *v.* The Queen (11 Blatch., 416),

where it was held that proceedings in the nature of a suit by libel in Admiralty *in rem* could be brought by the United States under Sec. 8 of the Act of July 18, 1866, which provides as follows:

"In any case where a vessel, or the owner, master, or manager, of a vessel, shall be subject to a penalty for a *violation of the revenue laws* of the United States, such vessel shall be holden for the payment of such penalty, and may be seized and proceeded against summarily by libel, to recover such penalty in any District Court of the United States having jurisdiction of the offense."

These cases are not in point. The act under which the jurisdiction was sustained expressly provided that the vessel could be proceeded against by libel in the United States District Court to enforce the penalty. Sec. 4,469 contains no similar provision, and yet that is the sole enactment relied upon to maintain the jurisdiction in the present case.

Sec. 4,469 speaks of a bond "to secure the satisfaction of the judgment." The use of the word "judgment" in this connection tends strongly to support the contention of the claimants that the lien given, 4,469, is in aid of the satisfaction of any judgment that may be recovered in a common law action against "the master or owner." The word decree is the appropriate term for the final judicial determination of an Admiralty Court, while the word judgment is the appropriate term for that of a common law court.

The penalty will not be enforced in Admiralty so as practically to take away the right to a trial by jury unless the statute necessarily compels such enforcement.

The most that the libellant contends is that Sec. 4,469 gives the jurisdiction by inference, because it

provides for a lien. The inference is not necessary and the word "judgment" goes far to negative it.

That Congress did not intend to confer this jurisdiction and take away the right of trial by jury in a suit brought by "any person" under Sec. 4,465 will appear plain by reference to Sec. 4,499 which provides for a penalty of $500 to the United States for the same offence, and expressly gives authority to libel the vessel for the recovery thereof. The Sec. is as follows:

"Sec. 4,499. If any vessel propelled in whole or in part by steam be navigated without complying with the terms of this title, the owner shall be liable to the United States in a penalty of five hundred dollars for each offence, one-half for the use of the informer; for which sum the vessel so navigated shall be liable, and may be seized and proceeded against by way of libel in any District Court of the United States having jurisdiction of the offence."

Sections 4,465, 4,469 and 4,499 are all contained in the same chapter, and relate to the same general subject.

If Congress had intended to give to "any person" the right given to the United States to proceed in Admiralty without the aid of a jury, Section 4,469 would not have left the matter to inference, but would have contained apt words to confer such a right, similar to those contained in Section 4,499, and in the Statute above quoted, upon which the cases of The Missouri and The Queen were decided.

Reading Sections 4,465 and 4,499 together, it is submitted that the words "any person" must be construed "any interested person," *i. e.*, any passenger, for otherwise Congress would have imposed

different two penalties by two different sections for the same offense, recoverable by two different suits by two different prosecutors. There is nothing repugnant in providing a penalty in Section 4,499, and at the same time giving indemnity to each passenger by Section 4,465, but Congress could not have intended to put the party committing the acts denounced in jeopardy twice for the same acts by two prosecutions purely penal.

The words "any person" in the section were designed to give each and every passenger a remedy, and to negative the idea that a recovery by one passenger would bar a recovery by the others.

Upon the point that no more than one penalty can be recovered in one suit, it is desired to call the attention of the Court to the following authorities:

Sturgis *v.* Spofford, 45 N. Y., 446.
Fisher *v.* N. Y. Central R. R. Co., 46 N. Y., 664.

It must be borne in mind that the taking on board of each separate passenger is a separate and distinct act, necessarily occurring at different times.

It might perhaps have been different if the act denounced had been to navigate the vessel with more than the prescribed number of passengers, for there the act would be a single one, that of navigating the vessel, and the number of passengers would measure the penalty for that single act.

II.—This action should have been commenced in the name of the United States.

(*a*). This will be particularly apparent if the Court should hold under Section 5,294, while it gives full power to the Secretary of Treasury to remit, yet

it does not invest him with power over prosecutions by private individuals for penalties given to those who sue for the same.

(*b*). Sec. 919 of the Revised Statutes, though not expressly naming this class of penalties, seems to lay down a general rule that such penalties can only be recovered in the name of the United States.

(*c*). Sec. 732 provides where such suits shall be brought—evidently pointing to a direct control by the Government officers.

(*d*). The general language of Sec. 3,213 seems to include this class of suits, viz.: "All suits for fines penalties and forfeitures, where not otherwise provided for, shall be brought in the name of the United States in any proper form of action, or by any appropriate form of proceeding *qui tam* or otherwise, before any Circuit or District Court of the United States, within which said fine, penalty or forfeiture may have been incurred, or before any other Court of competent jurisdiction.

It is true that this section is in the 35th Title, Chap. 2, relative to internal revenue, yet the language is so general as to include with great propriety all classes of penalties denounced by any of the laws of the United States. Then again it is eminently proper that all such prosecutions should be under the control of public officers, who do not institute such suits for private gain, but in the performance of a public duty, and such is the provision in Sec. 3,213 imposing a duty on the collectors of the respective districts.

If irresponsive private parties could be allowed to entertain such prosecutions it would be in the power of an opposition line to break down its com-

peting line by starting such prosecutions under the guise of public spirit and to carry out the law, yet really for their own malicious ends.

The institution of a suit in rem demanding large bail will as effectively ruin an opponent as to get a recovery against him.

Sec. 4,389 seems to ordain that all penalties recoverable in the sections preceding Sec. 4,389 in Title 50 should be brought in the name of the United States.

Sec. 4,190 seems to make it very clear that the United States must sue.

Since the decision in U. S. *v.* Simms, 1 Cranch., 252, which suggested that such suits should be in the name of the United States, the course of congressional legislation has been to make all penalties recoverable by the United States.

III.—The action in the Court below should have been commenced and prosecuted by the District Attorney of the United States, within and for the proper district, and not by private attorney or counsel.

(*a*) Sec. 771, 838, 1982, 2232, 3085, 3492, 4300, 4618 and 4619 of Rev. Stats., seem to put all classes of prosecutions for penalties denounced by the several laws of the United States under the control of the District Attorney.

(*b*) Sections 4499 and 5000 in Title 52, expressly seem to point out that the suits must be in the name of the United States, on the relation and for the half benefit of the informer. (See also United States *v.* Doughty, 7 Blatch., 424).

IV.—It is quite evident from the careful reading

of Sec. 4465, on which this action is founded, that if Mr. Pollock's view of his action is correct, that only one person can sue for the alleged penalties, as by the terms of the statute they are given "*to the party who sues for the same.*"

This right is not measured by the person who "recovers," but the *one who sues.*

This being a penal action every conclusion must be excluded.

Beadleston *v.* Sprague, 6 Johns., 101.
Elliot *v.* Railroad Co., 99 U. S., 573.

So, therefore, the party suing must be the "first one who sues."

Such being the conclusion, it necessarily follows that the party desiring to recover the penalty must show affirmatively that *no other person has sued for the same.*"

Pike *v.* Medbury, 12 N. H., 262.
Beadleston *v.* Sprague, 6 Johns., 101.

It should also appear that he is the informer who sues.

His character as "an informer" must appear. If not he is a stranger and ought not to recover. It is only as an "informer" or as a passenger that he can recover. Sec. 975 makes the informer liable for the costs of the suit. His character as an informer should therefore appear affirmatively.

He gives the first information which leads to the action.

It is as such that he is entitled to maintain his suit.

All of which should appear in the libel.

It is as an informer that under Sec. 5295 he is entitled to give testimony.

Now, if it is unnecessary to assert his character as the first person who sues, or the first person who informs, then in what character can he recover?

Then only "as a passenger." *The true reading of Sec. 4465 is that it is a penalty created for the protection of the passengers themselves.* It forfeits the passage money. Who paid the passage money—the informer Pollock? No; but only the passenger who is really aggrieved and put in danger by the excess of passengers.

If the section should read "to" instead of "for each passenger," the meaning is obvious that each passenger beyond the proper number is entitled to recover $10 penalty and his passage money, provided he sues.

Mr. Pollock's libel, under the construction of the statute, is untenable, because he does not allege that he was a passenger on board.

See Leonard *v.* Bosworth, 4 Comstock, 421.
Seward *v.* Beach, 29 Barb., 239.

V.—The libel below is defective because it unites in two counts demands for penalties founded in distinct passages or trips, grouping two sets of aggregate penalties.

(*a*) Sec. 4465 provides the penalty of passage money and $10 for each passenger in excess.

Now, he cannot group in the one count an aggregate number of penalties without in some way separating them by name or other designation.

Sec. 4467 provides as to keeping the correct list of the passengers, except in routes less than 100 miles, but it is nowhere alleged in the libel that the route in question was less than 100 miles, therefore the count is defective, because it does not separate and show how the 555 passengers are in excess of the number allowed.

The names should be given and accompanied by an allegation that they came on board after the number allowed by the certificate were on board, for the penalty is only for those passengers who were taken on board after the number in the certificate were on board.

The language of the statute is also distributable, *i. e.*, $10 for each passenger (whose name is required to be had or specified) beyond the number already on board.

In the first count the libellant Pollock alleges that the excess were taken on board at Bridgeport, in the State of Connecticut; but in the second he alleges that the excess was taken on board at the city of New York, in the State of New York. In neither count is it alleged that the offender (*i. e.*, the master or owner), or that even the vessel was in the Southern District of New York, at the time when the action was commenced. Sec. 732, which provides that all pecuniary penalties and forfeitures may be sued for and recovered within the district *where they accrue*, or in the district where the offender is found. So that in the absence of any averment that the offender (*i. e.*, the master or owner) were in the district at the time the suit was brought, it will follow that he libels the "Laura" for two distinct sets of penalties, *i. e.*, those exclusively triable in New York with those exclusively triable in Connecticut. This is as fatal to his case for the act denominated under Sec. 4465 as the "*taking on board.*"

Then again, in each count, without naming the passengers he alleges an excess of passengers numerically, and claims the $10 and passage money for each in a gross sum. This at common law was fatal.

See People *v.* McFadden, 13 Wend., 396, wherein such a mode of pleading was sustained because of

a peculiar statute in New York which does not exist in the United States Rev. Stat.

VI.—Now it may be said that the claimants and appellees in this Court are not in a condition to avail themselves of these points. Because they do not appeal from the Circuit below—yet the record shows that they raised these points in the District Court (see their answer, pp. 8 and 9.) They were argued also in the Circuit, as may be seen by our points in the Circuit herewith submitted. Both of these Courts considered and so adjudged the remission to be an ample defence. Their adjudication if here held to be erroneous ought not to prevent the claimants and appellees from asserting here their other defences.

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